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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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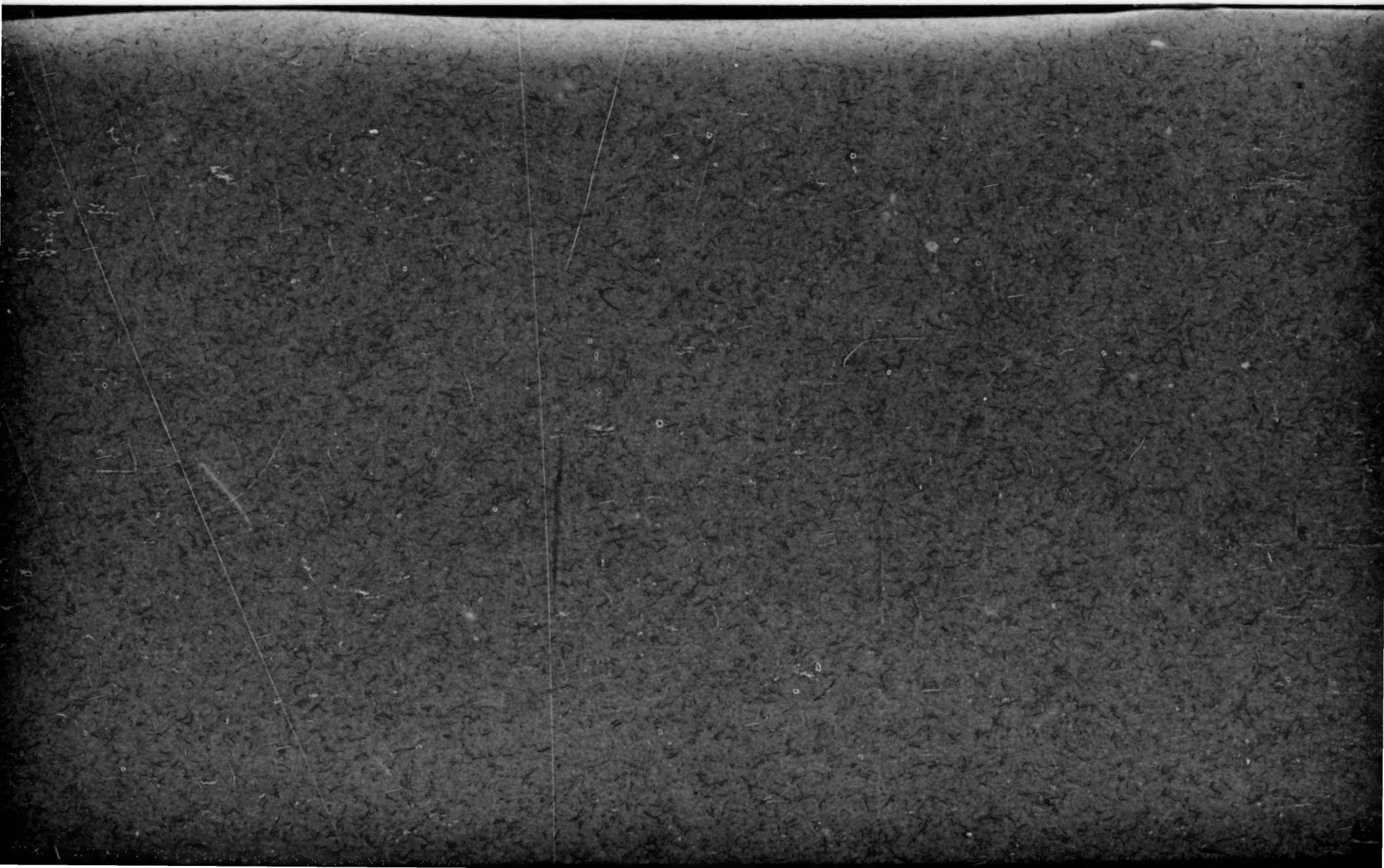

QUESTION PRESENTED

Whether the United States' navigational servitude, which permits the federal government to improve navigable waters free from claims of just compensation, bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in compensable damage to instream tribal property interests.

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondent is the Cherokee Nation of Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 782 F.2d 871. The opinion of the district court (App., *infra*, 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 29a) was entered on January 23, 1986. On April 22, 1986, Circuit Justice White extended the time for filing a petition for certiorari to and including May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in relevant part:

The Congress shall have Power * * *

* * * * *

[3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes * * *.

The Fifth Amendment provides in relevant part:

[N]or shall private property be taken for public use, without just compensation.

STATEMENT

The McClellan-Kerr Arkansas River Navigation Project is an extensive congressionally-authorized navigational improvement program that links the Southern Plains states with the Nation's inland waterway system. The Cherokee Nation of Oklahoma, which holds title to a portion of the Arkansas River's bed, initiated this suit in 1983 claiming that construction and operation of the project has effected a compensable taking of the Tribe's instream property interests. The United States responded that the government's firmly established power under the Commerce Clause to improve navigable waters free from suits demanding compensation for resulting instream property damage—the so-called "navigational servitude"—barred the Cherokee Nation's takings claim. The district court disagreed, holding that the United States had failed to preserve its navigational servitude in the relevant Indian treaties and patents (App., *infra*, 25a-28a). A divided court of appeals affirmed on different grounds, holding that the Cherokee Nation is subject to the navigational servitude, but the Tribe nonetheless "ha[s] a right to compensation for any consequent loss of property or diminution of value" to tribal interests resulting from the navigation project (*id.* at 16a).

1. The McClellan-Kerr Project, one of the Nation's largest and most important navigational improvement undertakings, provides water transportation essential to

the commerce of the Southern Plains region of the United States. The project represents the culmination of congressional efforts, begun early in the nineteenth century, to realize the full commercial potential of the Arkansas River, our country's fifth longest and thirteenth largest waterway.[1]

Congress initiated the McClellan-Kerr Project in 1935 by requesting the Army Corps of Engineers to investigate the prospects for a comprehensive program to improve the navigable reaches of the Arkansas River. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1045. The Corps responded in 1945, submitting a multi-purpose plan that would provide navigational, flood control, and hydropower benefits. H.R. Doc. 758, 79th Cong., 2d Sess. (1946). Navigation was the centerpiece of the plan. The Corps would develop and maintain a nine-foot deep, 480-mile channel in the Arkansas River from its mouth at the Mississippi River to Catoosa, Oklahoma. In addition, the Corps would construct a series of locks and canals providing 420 feet of lift between the Mississippi River and Catoosa (*id.* at 59-66). The Corps envisioned that Oklahoma, Colorado, New Mexico, Kansas, Texas, Missouri, and Arkansas would gain access to water transportation, either directly or through connections with highways, pipelines, and rail lines, increasing commerce along the Arkansas River from 600,000 tons per year to more than 9 million tons per year (*id.* at 47-49, 54-55).

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[1] Congress first authorized navigational improvements on the Arkansas River in 1832. See Act of July 3, 1832, ch. 153, 4 Stat. 551, 553. These improvements continued through the twentieth century. See, *e.g.*, S. Exec. Doc. 26, 33d Cong., 1st Sess. (1854); H.R. Exec. Doc. 295, 41st Cong., 2d Sess. 33 (1870); S. Misc. Doc. 22, 44th Cong., 1st Sess. (1876); H.R. Exec. Doc. 94, 45th Cong., 3d Sess. 8 (1879); Act of June 13, 1902, ch. 1079, 32 Stat. 331, 357; Act. of Mar. 2, 1907, ch. 2509, 34 Stat. 1073, 1092.

Congress approved the McClellan-Kerr Project in 1946. Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636. Construction commenced in 1957, and was essentially complete by 1971. As a result of this project, the residents of the Southern Plains region have enjoyed enhanced commercial, recreational, and hydropower benefits from the Arkansas River.

2. The Cherokee Nation's claim that the McClellan-Kerr Project has resulted in a Fifth Amendment taking of its instream property interests is premised upon the Tribe's recently established title to a portion of the Arkansas River's bed.

In 1966, the Cherokee, Chickasaw, and Choctaw Tribes initiated a lawsuit to establish Indian ownership of the riverbed from the confluence of the Arkansas and Grand Rivers to the Arkansas-Oklahoma border. Prior to this lawsuit, it was generally assumed that the State of Oklahoma, upon statehood, received title under the Equal Footing Doctrine to the bed of all navigable portions of the Arkansas River. The Tribes claimed, however, that the United States granted a portion of the riverbed to the Tribes prior to Oklahoma's statehood. The Cherokee Nation, in particular, asserted that the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, and a subsequently issued patent granting the Tribe fee simple title to a large tract of land within the present-day boundaries of Oklahoma gave the Tribe ownership of the riverbed. The Tribe further asserted that, while most of the Indian lands were later allotted and passed to non-Indian control, the riverbed remained under tribal ownership.

The dispute between the Tribes and the State of Oklahoma eventually reached this Court, where the United States participated as amicus curiae supporting the Tribe's claim of ownership. This Court ruled that the nineteenth century treaties and patents did grant the Tribes fee simple title to the disputed portions of the riverbed. *Choc-*

taw Nation v. *Oklahoma,* 397 U.S. 620 (1970). The Tenth Circuit concluded on remand, that the Tribes hold present title as against the State of Oklahoma (461 F.2d 674, 678, cert. denied, 409 U.S. 1039 (1972)), and a special three-judge panel later determined the ownership interests among the Tribes.[2]

Following this Court's decision in *Choctaw Nation,* Congress appropriated funds to the Department of the Interior to appraise the riverbed for the purpose of assisting the Tribes in managing the property. Interior, in turn, commissioned independent appraisers to conduct a valuation. The appraisal, completed in 1976, estimated the aggregate value of the Indian interests, including the value attributable to land rentals, minerals, recreation, dam sites and hydroelectric power generation, at $177 million (App., *infra,* 2a). See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations: Hearing on S. 660 Before the Senate Select Comm. on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977).

Thereafter, the Tribes sought to lease their riverbed property to the United States. The government declined their offer and the Cherokee Nation then sought compensation from Congress for damages to its mineral interests caused by construction of the McClellan-Kerr Project. Congress ultimately passed a special jurisdictional statute permitting the United States District Court for the Eastern District of Oklahoma to consider "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal

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[2] Under that court's decision, the Cherokee Nation holds title to the entire riverbed from the Arkansas River's confluence with the Grand River to its confluence with the Canadian River (a distance of approximately 37 miles) and to the northern half of the bed from the Canadian River to the Arkansas-Oklahoma border (a distance of approximately 50 miles). See *Choctaw Nation* v. *Cherokee Nation,* 393 F. Supp. 224, 246 (E.D. Okla. 1975).

assets related to and arising from construction of the [McClellan-Kerr Project]." Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944.

3. In May 1983, the Cherokee Nation filed a complaint in the district court alleging that the construction of the McClellan-Kerr Project resulted in a taking of the Tribe's riverbed interests in violation of the Fifth Amendment and the United States' fiduciary obligations to the Tribe. The United States asserted, among other defenses, that the government's navigational servitude precludes liability for the alleged taking and that the exercise of the navigational servitude did not violate any duty owed by the United States to the Tribe. Pursuant to the parties' suggestion, the court bifurcated the trial to consider first, on cross-motions for summary judgment, the goverment's navigational servitude defense and the breach of fiduciary duty claim.

The district court granted summary judgment in favor of the Tribe. The court held that this Court's ruling in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging exclusively to the Cherokee Nation" (App., *infra,* 26a). The court further held that the United States, having failed to reserve a navigable servitude in its treaty with a sovereign Indian nation, owed the Tribe just compensation (*id.* at 27a). The court did not address the fiduciary duty issue. The court concluded, sua sponte, that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion" (*id.* at 28a) and therefore certified the case, pursuant to 28 U.S.C. 1292(b), for interlocutory appeal.

The court of appeals granted the government's petition for interlocutory review (App., *infra,* 24a). A divided panel ultimately affirmed the district court's decision, but adopted a different analysis. The court rejected the district court's conclusion that "the failure of the United

States to reserve a navigational easement in the treaty grant" operated to defeat its constitutional power under the Commerce Clause, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (*id.* at 9a). The court nevertheless concluded that the navigational servitude did not protect the United States from liability.

The court stated that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large" (App., *infra,* 10a (emphasis in original)). The court further stated that the scope of the government's navigational servitude therefore depends on whether the navigational improvements interfere with property rights connected to private navigational uses or with property rights connected with other types of uses (*ibid.*). The court concluded—without citing any precedential support—that "[w]hen the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due" (*ibid.*).

The court then recited a number of factors that, it concluded, make this case "unique" (App., *infra,* 11a). It noted that the Cherokee Nation holds fee simple title to the riverbed (*id.* at 10a), that the Tribe's property interests are secured by treaty (*id.* at 12a), and that the government has a trust relationship with the Tribe (*id.* at 13a). The court also accepted the Cherokee Nation's contention that the Tribe's ownership of a portion of the Arkansas River's bed "makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a) and that "this status has not been lost simply because the Tribe has not excluded navigation" (*ibid.*). It summarized its decision as follows (*id.* at 16a):

> The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value.

The court then remanded the case for a determination of damages under the taking claim and "whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact" (*ibid.*).

Judge Seth dissented (App., *infra,* 17a-23a). He explained that the nature and source of the Tribe's title to the riverbed make no difference in determining the scope of the government's navigational servitude (*id.* at 18a). He observed that "navigable rivers are 'public property' and have been since the earliest time" (*id.* at 19a). He then surveyed the numerous decisions of this Court holding that instream and riparian property rights are held subject to the federal government's dominant power to improve navigable waters (*id.* at 19a-22a), noting that the "exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject" (*id.* at 22a). He also explained that the Tribe's treaty rights do not "increase the extent or nature of the Cherokees' title" to create a " 'fee plus' " (*id.* at 23a), observing that there is no authority for treating a naturally navigable waterway as a " 'private river' " or for "creat[ing] an exception to the application of the navigational servitude because plaintiff is an Indian tribe" (*ibid.*). Finally, he rejected the notion that the Cherokee Nation could enlarge its property rights by invoking the United States' trust obligations to the Tribe (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals plainly erred in concluding that the United States' construction of the McClellan-Kerr Project has resulted in a compensable taking of the Cherokee Nation's property interests. The United States' established power to improve navigation free from Takings Clause claims—its so-called "navigational servitude"—precludes private claims for instream property damage regardless of whether the claimant is a private party, a state, or an Indian tribe. The court of appeals' contrary conclusion is fundamentally inconsistent with decisions of this Court construing both the navigational servitude and the Cherokee Nation's instream property interests.

The court's ruling drastically alters the character of the navigational servitude. The court, concluding that the United States' navigational improvements are subject to the same ad hoc takings analysis that is applicable to any other species of takings claim, reduces the government's navigational servitude to no more than a mere right to ply the waters of navigable streams. The practical ramifications are serious. The decision will expose the public fisc to multi-million liability in this case alone and will encourage similar suits, by both Indian tribes and private parties, demanding comparable damages awards. Furthermore, the decision, if left uncorrected, will provide a windfall to instream property owners and will ultimately discourage the construction of navigation projects that benefit the public at large. In short, the case presents an important federal question meriting this Court's review.

1. The controlling principles here are familiar. "The Commerce Clause confers a unique position upon the Government in connection with navigable waters." *United States* v. *Rands*, 389 U.S. 121, 122 (1967). It broadly empowers the government to regulate, improve, and control navigable waters for commercial use (*id.* at 122-123). "This power to regulate navigation confers upon the

United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S., 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high water mark." *Rands,* 389 U.S. at 123. The United States, in the exercise of its navigational servitude, may improve navigable waters free from claims for compensation from entities claiming property interests in the stream or the underlying lands.[4] As this Court has explained (*ibid.*):

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

By thus permitting Congress to enhance transportation and commerce along the nation's great waterways, the navigational servitude provides substantial benefits to both riparian and nonriparian interests, upstream and downstream, and plays a significant role in the commercial unification of all components of the United States, including Indian tribes.

The navigational servitude does not, of course, "create[] a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote

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[4] *E.g., United States* v. *Grand River Dam Authority,* 363 U.S. 229, 231-232 (1960); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 224-225 (1956); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 509 (1945); *United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390 (1945); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. 592, 596 (1941); *Willink* v. *United States,* 240 U.S. 572, 580 (1916); *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. 251, 258-259 (1915); *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. 82, 89 (1913); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62-63 (1913); *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900); *Gibson* v. *United States,* 166 U.S. 269, 271-272 (1897).

navigation." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979). For example, "[t]he navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid." *Rands*, 389 U.S. at 123.[5] And when a previously private pond—made navigable through private efforts—is opened to public access against the wishes of its owners, just compensation is also due. *Kaiser Aetna*, 444 U.S. at 178-179. But the rule remains firmly established that title to submerged lands beneath a naturally navigable river "is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require." *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 88 (1913). See, *e.g.*, *Kaiser Aetna*, 444 U.S. 175-176; *Rands*, 389 U.S. at 123. This Court has never deviated from the fundamental tenet that the United States owes no compensation to parties who claim that the government's navigational improvements impair their use of a naturally navigable waterway or their property interests in the waterway's bed.[6]

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[5] Notably, however, the United States bears no constitutional obligation to compensate the owner of fast lands for value attributable to riparian location. See *Rands*, 389 U.S. at 123-125.

[6] See *United States* v. *Grand River Dam Authority*, 363 U.S. at 231-232; *United States* v. *Twin City Power Co.*, 350 U.S. at 224-225; *United States* v. *Willow River Power Co.*, 324 U.S. at 509; *United States* v. *Commodore Park, Inc.*, 324 U.S. at 390; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. at 596; *Willink* v. *United States*, 240 U.S. at 580; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. at 258-259; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. at 89; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 62-63; *Scranton* v. *Wheeler*, 179 U.S. at 163; *Gibson* v. *United States*, 166 U.S. at 271-272.

2. The court of appeals correctly recognized that the Cherokee Nation's title to submerged lands is subject to the government's dominant navigational power, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (App., *infra*, 9a).[7] The court went astray in assessing the character of the government's constitutional power. Its conclusion that the United States must pay compensation for impairment of instream property rights departs without justification from a century of contrary precedent.

a. The court of appeals erred, first, in stating—without any precedential support—that (App., *infra*, 10a):

> When the exercise of [the navigational servitude] affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

This is a clear misstatement of the law, at least with respect to interests within the bed of a navigable river. This Court has never held that the scope of the government's servitude

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[7] As the court of appeals recognized (App., *infra*, 9a), the district court was plainly wrong in holding that the navigational servitude cannot be applied to Indian tribes unless reserved in the relevant treaties and patents. This Court has repeatedly indicated that the navigational servitude applies without exception to all holders of riparian and riverbed interests. See, *e.g*, *United States* v. *Grand River Dam Authority*, 363 U.S. at 233 ("When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."). Indian tribes, like the states, are equally subject to the federal government's navigational easement. See *Montana* v. *United States*, 450 U.S. 544, 555 (1981). See also *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (" 'although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude' ") (quoting *Gibson* v. *United States*, 166 U.S. at 271). For further discussion of this point, see page 15, *infra*.

depends on the private owner's use of the submerged lands; instead, the Court has repeatedly stated, without qualification, that *all* property within the bed of a navigable waterway is held subject to the government's right to make navigational improvements.[8]

For example, this Court has held that the United States can dredge navigable bays, destroying privately cultivated oyster beds, without paying compensation. *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. at 87-89. The Court, in reaching this result, nowhere suggested that the non-navigational character of the oystermen's activities are relevant to the question of compensability. See also *Coastal Petroleum Co.* v. *United States,* 524 F.2d 1206 (Ct. Cl. 1975), cert. denied, 449 U.S. 1011 (1980) (destruction of limestone deposits). The Court has also held that no compensation is due where the government's navigational improvements interfere with other non-navigational activities, including the placement of bridges in or over navigable waters,[9] and the use of stream flow for hydropower development activities.[10] In short, the govern-

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[8] See *Kaiser Aetna,* 444 U.S. at 175-176 (quoting *Scranton* v. *Wheeler,* 176 U.S. at 163); *United States* v. *Rands,* 389 U.S. at 123; *United States* v. *Twin City Power Co.,* 350 U.S. at 224-225; *United States* v. *Willow River Power Co.,* 324 U.S. at 509; *United States* v. *Commodore Park, Inc.,* 324 U.S. at 390; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. at 596; *Willink* v. *United States,* 240 U.S. at 580; *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. at 258-259; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. at 87-89; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. at 62; *Scranton* v. *Wheeler,* 179 U.S. at 163; *Gibson* v. *United States,* 166 U.S. at 271-272.

[9] *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 421 (1917); *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400-401 (1907).

[10] *United States* v. *Grand River Dam Authority,* 363 U.S. at 231; *Twin City Power Co.,* 350 U.S. at 225-226; *United States* v. *Willow River Power Co.,* 324 U.S. at 509; *United States* v. *Chandler-Dunbar Water Power Co.* 229 U.S. at 72. Notably, the Cherokees, in this case, demand compensation for claimed interference with their dam site and hydropower development opportunities. See Complaint 8-9.

ing rule in the instant case is plain and firmly established: the government owes no compensation when navigational improvements impair or destroy property located within the bed of a naturally navigable body of water. The court of appeals' ad hoc balancing of interests dramatically departs from this long settled constitutional principle.[11]

b. Even if it were appropriate to conduct a balancing of public and private interests, the court here plainly relied on factors that are simply irrelevant to a takings analysis.

For example, the court relied (App., *infra,* 10a) on the fact that the Cherokee Nation holds fee simple title to the riverbed. However, there is nothing unique about fee simple ownership of riverbed interests. The states, under the Equal Footing Doctrine, generally acquire fee simple title to lands beneath navigable waters upon their entry into the Union. See, *e.g., Montana* v. *United States,* 450 U.S. 544, 551 (1981). And private parties may hold fee simple title to lands beneath navigable waters through grants from the federal and state governments (see, *e.g., id.* at 551-552) or by principles of state property law (see, *e.g., United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. 592, 596 (1941); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 60-61 (1913)). This Court has long held that "although the title to the shore and submerged soil is in the various States and individual owners under them it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution." *Id.* at 63 (quoting

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[11] The court of appeals' ruling apparently originates in a misreading of cases dealing with compensation for navigational improvements that impair property *above* the high water mark. See App., *infra,* 10 a. The general rule, set forth in *Rands,* is that an owner is entitled to compensation for the taking of fast lands, but value attributable to riparian location, such as power site or port site value, is noncompensable absent a specific statutory allowance. 389 U.S. at 123-125. That rule has no application to this case since the Tribe owns only the stream bed.

Gibson v. *United States*, 166 U.S. 269, 272 (1897)). There is no reason why the Cherokee Nation's title should be treated differently.

The court of appeals also attempted to distinguish this case on the ground (App., *infra*, 11a) that the Cherokee Nation received its title through a treaty with the United States. But the Tribe's property rights do not turn on the form of the conveyance. The Cherokee Nation, like any owner of lands beneath navigable waters, took its riverbed interest subject to the federal government's power under the Commerce Clause to regulate and promote navigation. As the court of appeals itself recognized (*id.* at 9a), the United States did not need to reserve its Commerce Clause powers in its treaties with the Indian tribes. See, *e.g.*, *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890) (holding that Cherokee lands are subject to federal power of eminent domain). The navigational servitude is a constitutional power rather than a property right. *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225 (1956). Accordingly, the government is not obligated to reserve the servitude in Indian treaties and patents. Thus, the Tribe has no legitimate claim that the government's assertion of its navigational servitude abrogates any tribal treaty right.[12]

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[12] Notably, the United States had recognized the Arkansas River as an important commercial artery at the time of the treaty and had already made navigational improvements to the lower reaches of the waterway. See H.R. Doc. 195, 23d Cong., 2d Sess. (1835). The Cherokees, although characterizing the river as a "private waterway" (App., *infra*, 15a), have never had an exclusive claim to its use. In all events, even property interests in submerged lands that predate the formation of the Union—including title to submerged lands within the original thirteen colonies—are subject to the navigational servitude. See *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. at 86; *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876). There is no reason to give the Cherokees a special exemption from the United States' generally applicable constitutional powers.

The court of appeals' reliance (App., *infra,* 12a) on the government's fiduciary obligations to the Tribe is similarly misplaced. Certainly, the government does not violate its trust responsibilities by refusing to pay Indian tribes for impairment of noncompensable interests. And the court seriously errs in characterizing the Arkansas River as "a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a). This Court has repeatedly stated that navigable waters are " '[incapable] of private ownership.' " *Kaiser Aetna,* 444 U.S. at 179, quoting *United States* v. *Chandler-Dunbar Co.,* 229 U.S. at 69. A private party may hold title to a riverbed or adjoining fast lands, but the stream itself remains " 'public property of the nation, and subject to all the requisite legislation by Congress.' " *Rands,* 389 U.S. at 123, quoting *Gilman* v. *Philadelphia,* 71 U.S. (3 Wall.) 713, 724-725 (1866).

In short, the court of appeals failed to identify any convincing basis for exempting the Cherokee Nation from the United States' firmly established Commerce Clause powers.[13]

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[13] Although the court of appeals premised the government's Fifth Amendment liability, in part, on fiduciary principles (App., *infra,* 13a-14a), it also instructed the district court to determine "whether the fiduciary duty owed by the United States was breached as a matter of fact" (App., *infra,* 16a). Thus, the court of appeals apparently believed that the Tribe is entitled to additional recovery under its fiduciary duty claim. However, that claim fails for the same reason that fiduciary principles are irrelevant to the takings analysis. The government does not violate its trust responsibilities by exercising valid constitutional powers that advance the general public interest. This Court has indicated that the exercise of valid governmental powers that incidentally affect Indian interests does not constitute a breach of fiduciary obligations. *Nevada* v. *United States,* 463 U.S. 110, 128 (1983). See also *Cherokee Nation* v. *Southern Kansas Ry.,* 135 U.S. 641 (1890) (Indian tribes are subject to federal eminent power); *Seminole Nation* v. *United States,* 492 F.2d 811, 819 (Ct. Cl. 1974) (same); *Moore* v. *United States,* 157 F.2d 760, 765 (9th Cir. 1946),

c. The court of appeals not only misapplied the United States' navigational servitude, it also ignored this Court's prior determination of the scope of the Cherokee Nation's property interests. In *Choctaw Nation*, this Court held that the Indian Tribes received fee simple title to portions of the bed of the Arkansas River. But the Court specifically observed that the United States retained its navigational servitude in the Arkansas River, stating that "the United States seems to have had no present interest in the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." 397 U.S. at 635. This Court thus recognized that the Tribes' ownership of the riverbed is subject to familiar Commerce Clause constraints.[14]

The Court's statement was not inadvertent dicta. The Indian tribes, in briefing that case, expressly agreed that their riverbed interests were subject to the United States' navigational servitude. The Cherokee Nation, in its opening brief, stated that "there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946)." Cherokee Nation Br. 19. See also Choctaw and Chickasaw Nations Br. 48-49; United States Br. 24. The Tribe forcefully reiterated this point in its reply brief, specifically stating (Cherokee Reply Br. 13-14):

> Throughout their brief respondents imply that if title to the river were vested in the [Tribe] and not in the state (under the equal footing-implied trust doctrine)

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cert. denied, 330 U.S. 827 (1947) ("The fact that navigable waters are a part of a reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation.").

[14] See also *Montana* v. *United States*, 450 U.S. 544, 555 (1981) ("the United States retains a navigational easement in the navigable waters within the described boundaries [of the Crow Reservation] for the benefit of the public, regardless of who [Montana or the Crow Tribe] owns the riverbed").

> the authority and power of the United States could somehow be compromised. Such an inference is absurd; no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same.

The Cherokee Nation, having established its ownership of the riverbed, now seeks to disown its prior representations to this Court.

3. This case has serious practical ramifications. Of immediate concern, the court of appeals' decision threatens the United States with multi-million dollar liability, in this case alone, for traditionally noncompensable damages. The Tribe has not quantified its alleged damages, but it has requested fair market value for "the Cherokee Nation's lands," "past and future loss of the sand and gravel and coal deposits," and "the damsites thus taken by [the United States] and for the electrical energy generated at such sites" (Complaint 8-9). The court of appeals, stating that "the Cherokees have a right to compensation for any consequent loss of property or diminution in value" (App., *infra,* 16a), apparently contemplated that all of these alleged damages are compensable. As previously noted, the Department of the Interior's 1976 appraisal estimated that portions of the riverbed held collectively by the Cherokees, Choctaws, and Chickasaws were worth $177 million, of which $133 million was attributable to the Cherokee Nation. See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations: Hearing on S. 660 Before the Senate Select Comm. on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977). The Tribe will no doubt claim that they are entitled to damages of at least that amount.

The court of appeals' decision will also affect other pending litigation. For example, the United States is presently defending a similar suit in which the Colville Tribe has claimed damages of more than $130 million based on the

United States' construction of the Grand Coulee Dam on the Columbia River. *Confederated Colville Tribe* v. *United States,* No. 181-D (Claims Ct.). See 39 Indian Cl. Comm'n 159 (1979). In addition, the Department of the Interior believes that at least 12 other Indian tribes have substantial claims to ownership of lands beneath navigable rivers and, consequently, could assert claims against the government for damage caused by navigational improvements.

Finally, the court's rationale, dramatically altering the character of the navigational servitude, is not limited to Indian tribes. The court's ruling that the United States' navigational improvements are subject to the same ad hoc takings analysis that is applicable to any other species of takings claim logically reduces the government's navigational servitude to no more than a mere right to ply the waters of navigable streams. The decision will encourage suits by private parties demanding compensation for damages that previously were considered noncompensable. The decision, if left uncorrected, will upset settled expectations, will provide a windfall to instream property owners at the public expense, and will ultimately discourage the construction of navigation projects that benefit the public at large. In sum, the case presents an important federal question meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MAY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84-2355

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 83-306-C)

Before MOORE and SETH, Circuit Judges, and MATSCH, District Judge.*

MOORE, Circuit Judge.

This is an interlocutory appeal granted pursuant to 28 U.S.C. § 1292(b) to consider whether the assertion of a navigational servitude by the United States prevents liability for an alleged Fifth Amendment Taking of land held in fee simple by the Cherokee Nation of Oklahoma (Cherokee Nation or appellee). A second issue, whether the exercise of a navigational servitude constituted the breach of some duty of care to the Cherokee nation, was reserved pending this appeal. The district court sustained

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* Honorable Richard P. Matsch, United States District Judge for the District of Colorado, sitting by designation.

the Cherokee Nation's motion for summary judgment, holding that the United States, having granted fee simple title to the banks and bed of the Arkansas River with no reservation of a navigational servitude, is liable for a taking of private property and must pay just compensation. The United States sought interlocutory review contending the construction of the Arkansas River Navigation System, the McClellan-Kerr Navigation Project (the Project), does not constitute a compensable taking of the Cherokee Nation's interest in the bed of the Arkansas River. Upon our review of the facts of this particular case and the law, we affirm the district court's holding but do not adopt its reasoning. We do not address the second issue.

By statute, Pub. L. No. 97-385, 96 Stat. 1944 (1982),[1] Congress conferred special jurisdiction on the district court to hear the Cherokee Nation's claim for damages.[2]

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[1] The statute provides in part:

> [J]urisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation. . . .

[2] This claim derives from an initial appraisal done by the Department of Interior after the Supreme Court concluded the Cherokee Nation held title to the bed and banks. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The Department of Interior valued the entire Cherokee interest in the riverbed at $177 million. From 1976 until

The Cherokee Nation alleged that to create the Project, the United States constructed dams and waterways, altering the channel of the river and causing the loss of valuable deposits of sand, gravel, and coal. Specifically, the Webbers Falls Lock and Dam No. 16, the Robert S. Kerr Lock and Dam No. 15, and the W. D. Mayo Lock and Dam No. 14, were designated as located in whole or in part on Indian lands granted in the 1838 patent. The Cherokee Nation alleged a Fifth Amendment Taking and sought just compensation for the past and future loss of the mineral deposits, fair market value of the damsites, and other damage to the bed and banks of the Arkansas River. The parties stipulated to the facts and agreed to address the issue of liability separately on cross-motions for summary judgment.

I. Standard of Review

We premise our review of the district court's granting judgment in favor of the Cherokee Nation, on cross-motions for summary judgment, on the same considerations before the trial court under Fed. R. Civ. P. 56(c). *United States v. Gammache*, 713 F.2d 588, 594 (10th Cir. 1983). In examining the record, we, too, must decide whether any genuine issues of material fact exist to preclude one of the cross-movants from proceeding to litigate that issue. Any inferences appropriately arising must be viewed in the light most favorable to the party against whom they are offered. *Weir v. The Anaconda Co.*, [773] F.2d [1073], (10 Cir. Aug. 9, 1985); *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984). An ultimate determination is equally and neces-

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1980 neither Congress nor the Department of Interior could agree on liability or an appropriation for the loss. After Congress failed to act on the Cherokees' direct petition for $8.5 million in claimed damages, this special jurisdictional grant was enacted to litigate the claim.

sarily predicated on the correct application of the substantive law. *Daitom, Inc. v. Pennwalt Corp.* 741 F.2d 1569, 1574 (10th Cir. 1984); *Western Casualty & Surety Co. v. National Union Fire Insurance Co.*, 677 F.2d 789 (10th Cir. 1982). This standard is not talismanic but fully requires that we look beyond the pleadings to determine whether the moving parties present any factual dispute capable of a trial's resolution. We must be convinced beyond a reasonable doubt that this "salutary device" appropriately resolves the issue before us. Fed. R. Civ. P. 56 advisory committee note; *See also Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975).

II. Background

Although the facts giving rise to this particular case are not in dispute, a conflicting view of the broader historical background underpins the divergent legal analysis. Our task is simplified by the Supreme Court's review in *Choctaw Nation v. Oklahoma*, 397 U.S. 619 (1970), on which the district court also relied. At issue in *Choctaw Nation* was the title to land underlying certain navigable portions of parts of the Arkansas River in Oklahoma. Beginning with the post-revolutionary period, the Court traced the early history of the Cherokee Nation as it, like the other Five Civilized Tribes,[3] experienced the increasing pressure of white settlement in their territory and the correspondingly insistent federal removal policy. Wary of promises of a permanent home and federal protection, the Cherokees resisted relocation and met with hostility, both from the

[3] The Cherokees, Creeks, Choctaws, Chickasaws and Seminoles comprise the "Five Civilized Tribes."

State of Georgia, where the Cherokees were settled, and the federal government, which was anxious to placate white settlers.[4]

The Court reviewed this history as background for an understanding of the Treaty of New Echota, signed on December 29, 1835, and negotiated with a faction of the Cherokees fearful of a forced military removal. In the Treaty of New Echota, the United States granted a vast area of its western territory, now the eastern part of the State of Oklahoma, in exchange for the cession of all Cherokee land east of the Mississippi River. *Choctaw Nation*, 397 U.S. at 627. The United States covenanted to convey these lands in fee simple. The Cherokee Nation was promised a permanent home which would "never be embraced within the boundaries of any State or Territory." Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp 439. In 1838, those Cherokees who refused voluntary removal suffered the forced migration, later referred to as the "Trail of Tears,"[5] to these western lands. The Treaty of New Echota was intended to provide a permanent and enduring resolution for the Cherokee Nation. *Choctaw Nation*, 397 U.S. at 635.

Nevertheless, these solemn vows were tested by new settlement pressure in Indian territory. *Id.* at 628. Unable to relocate the Cherokees, the new federal policy sought instead to allot Indian lands and terminate tribal affairs in

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[4] *See* F. Cohen, Handbook of Federal Indian Law 78-84 (1982 ed.) and citations therein. Georgia's confrontation with the Cherokees precipitated a crisis between the Cherokees, the Supreme Court and Georgia. As related by Cohen, Georgia, impatient with the federal removal policy, extinguished Indian title and sought to distribute the Cherokee lands. Consequently, some Cherokees were initially resettled in Arkansas.

[5] More than 4,000 Cherokees perished in the march. "The Trail of Tears has come to symbolize the brutality of Indian removal." Cohen at 92.

order to facilitate Oklahoma's admission to the Union on an "Equal Footing" with the original states. Oklahoma relied on this Equal Footing Doctrine in *Choctaw Nation* to claim title to the bed of the Arkansas River in which Oklahoma had executed various leases.

In holding that the United States intended to and did convey to the Indians fee simple title to the bed of the Arkansas River, the *Choctaw* court relied on both "the circumstances of the treaty grants and the countervailing rule of construction" that treaties with Indian nations must be interpreted as the Indians would have understood their meaning.[6] Citing *Shively v. Bowlby*, 152 U.S. 1 (1894) (title to the riverbed is an incident of state sovereignty); *Brewer-Elliott Oil and Gas Co. v. United States*, 260 U.S. 77 (1922) (Congress has the power to convey land below the high water mark of navigable waters; thus, the United States expressly conveyed a portion of riverbed to Osages); and *United States v. Holt State Bank*, 270 U.S. 49 (1926) (United States' intention to convey must be definitely declared), the Court recognized that the literal letter of these holdings did not require that "courts blind themselves to the circumstances of the grant in determining the intent of the grantor." *Choctaw Nation*, 397 U.S. at 635. The Court added:

> As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. . . . We do not be-

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[6] The Court noted that "these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather treaties were imposed upon them and they had no choice but to consent." *Choctaw Nation*, 397 U.S. at 631.

> lieve that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise.

Id. at 636. The Court gave full effect to the government's promise that no State or Territory would ever embrace the lands granted and refused to engage in the legal fiction that the river bisecting the Cherokee land was excluded from the grant. In a later appeal, we affirmed the district court's order on remand from *Choctaw Nation*, holding that the Supreme Court had decided past and present ownership. *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 677-78 (10th Cir. 1972).

III. Navigational Servitude

A.

Against this background, we now decide whether the district court erred in holding that the failure to reserve a navigational servitude in the patent amounted to a loss of the right to assert it. The United States argues the navigational servitude is a constitutional power arising from the Commerce Clause and permits no "special exception" for Indian tribes. To conclude, as did the district court, that having failed to reserve a navigational servitude, the United States loses that power is "unprecedented" according to appellant. Moreover, contrary to the district court's reference to the Cherokee Nation as a sovereign nation, the United States contends the appellee is a quasi-sovereign at the sufferance of Congress and subject to the dominant power of a navigational servitude. Indeed, appellant concludes that if the fact the Cherokees own the riverbed is set aside, this case is only an "ordinary instance" in which the United States seeks to assert its dominant authority.

The government supports its position by focusing on the following language of *Choctaw Nation*: "Indeed the United States seems to have had no present interest in the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." *Choctaw Nation,* 397 U.S. at 636. Although the Court was concerned with the issue of title in *Choctaw Nation*, the quoted language being merely dictum, it is instructive here to provide direction for our inquiry.

We agree with appellant that the term navigational servitude describes the superior interest of the United States in navigation and the nation's navigable waters. *United States v. Twin City Power Co.,* 350 U.S. 222, 224 (1956). "The servitude derives from the Commerce Clause and is a concept of power, not of property." *Id.* The term expresses the notion that the right of the public to use a waterway supersedes any claim of private ownership. *United States v. Cress,* 243 U.S. 316 (1917); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913). Indeed, as a matter of federal power, the navigational servitude has been most useful in defining federal interests when conflicting state and local controls are imposed on interstate waters. *See Twin City Power, supra.*

In the interest of interstate commerce, to improve navigation, and to preserve the waterways for public use, the navigational servitude may thus be asserted as an exception to the Taking Clause. This exception derives from the principle that the power over our nation's waters is an incident of sovereignty. *Shively v. Bowlby,* 152 U.S. 531 (1893). However, while the exercise of the navigational servitude may create an exception to the government's obligation to pay just compensation under the Eminent Domain Clause of the Fifth Amendment, the Supreme Court has never held that "the navigational servitude creates a blanket exception to the Taking Clause whenever Congress exercises its Commerce Clause authority to pro-

mote navigation." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). Each case requires an ad hoc examination and balancing of the public and private rights at stake. *Cress,* 243 U.S. at 321.

At the outset, we are not impressed by the failure of the United States to reserve a navigational easement in the treaty grant, despite other reservations.[7] As stated, the navigational servitude is a power arising from the Commerce Clause and triggered by the perception of Congress that this dominant right exists in the interest of navigation. Thus, it is certain the United States retained a navigational servitude in the Arkansas River. The existence of the power is not at issue. Rather, it is its effect that concerns us.

The Supreme Court has reviewed a variety of cases on the issue of whether compensation is required in specific instances when a navigational servitude is exercised. One group of claimants denied recovery is riparian owners claiming losses arising from the raising or lowering of the water level in a navigable stream. *See, e.g., Twin City Power, supra.,* and *Chandler-Dunbar, supra.* No compensation is required for private improvements connected to fastlands but located in navigable waters. *See, e.g, United States v. Runds,* 389 U.S. 121 (1967); *United States v. Commodore Park,* 324 U.S. 386 (1945); *United States v. Chicago, M., St. P. & P. R. Co.,* 312 U.S. 592 (1941). Nor is compensation ordered when structures in the water

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[7] The grant was made "subject to the right of the United States to permit other tribes . . . to get salt on the salt plain" and included three reservations: (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which might be within the bounds of these Cherokee lands; and (3) the right to establish and maintain military posts and roads, together with the free use of land, timber, fuel, and materials for the construction and support of those facilities.

(wharves, ferry docks) are condemned or altered to improve navigation or navigational safety. *Greenleaf Lumber Co. v. Garrison,* 237 U.S. 251 (1915); *United States v. City of Valdez,* 666 F.2d 1236 (9th Cir. 1982).

However, in each of these cases, the Supreme Court has emphasized that "the non-compensable loss was related, either directly or indirectly to the riparian owner's 'access to, and use of, navigable waters.' " *Kaiser Aetna,* 444 U.S. at 189 (Blackmun, J., dissenting) (citing *Rands,* 389 U.S. at 124-125). Even the *Kaiser* dissent acknowledged that the distinction between compensable and non-compensable values should have nothing to do with the *use* of navigable waters. Moreover, it is the character of the invasion, not the amount of damage resulting from it, that determines whether a taking has occurred. *Cress,* 243 U.S. at 328.

Thus, the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large. *Rands,* 389 U.S. at 125. When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due. The navigational servitude is not without constitutional limitation. Furthermore, if Indian property is taken for non-Indian use within this context, constitutional strictures are equally applicable. *See Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937); *Choate v. Trapp,* 224 U.S. 665 (1912).

The uniqueness of the present case derives from the Cherokee Nation's fee simple ownership of the banks and bed of the Arkansas River. The Cherokee Nation is not a mere riparian owner. Title to the banks and bed above and below the high water mark resides with the tribe. This ownership is secured by treaty. The *Choctaw* court was unequivocal in deciding that the treaty could only be

understood in the context of the Cherokee Nation's history. The United States intended that title to the dry bed left from avulsive changes in the river's course remain with the tribe. *Choctaw Nation,* 397 U.S. at 634. Similarly, if the river is flooded and Indian lands and resources that had once been dry bed are altered or destroyed, the Cherokee Nation's tribal assets have equally been affected.

The Court has recognized that *Choctaw Nation* is unique in a line of cases construing reservation grants and treaty rights. In *Montana v. United States,* 450 U.S. 554 (1981), the nature and scope of the Crow Nation's power to regulate hunting and fishing rights by non-Indians was at issue. The Court held that title to the riverbed did not pass with the grant of tribal lands. Distinguishing *Choctaw Nation*, the Court explained, "the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case." *Id.* at 556, n.5. The Court underscored the "special emphasis" placed on the government's promise that the lands reserved to the Choctaws and the Cherokees would never become part of any state. "Neither the *special historical origins* of the Choctaw and Cherokee treaties nor the *crucial provisions* granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868." *Id.*[8]

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[8] The government cites *Montana* to support its contention that the navigational servitude precludes the Cherokee Nation's taking allegation. The cases are not similar. The *Montana* court expressly held that title to the river passed to the state upon its admission to the Union; *Choctaw Nation* holds that opposite. *Confederated Salish and Kootenai Tribes v. Namen,* 534 F.2d 1376 (9th Cir.), *cert. denied,* 429 U.S. 929 (1976), is equally inapposite to the government's argument.

In the face of the Supreme Court's emphasis of the special circumstances surrounding the grant to the Cherokee Nation, we must also consider the principle that rights secured by treaty will not be deemed to be abrogated or modified absent a clear expression of Congressional purpose. *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1005 (8th Cir. 1976). "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 413 (1968); *Accord Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979).

Appellee cites *Squire v. Capoeman,* 351 U.S. 1 (1956), a tax case involving Indian lands, for the proposition that the language used in treaties with the Indians must be read to assure the full Congressional intention behind the grant. In concluding that timber harvested from Indian lands was not subject to capital gains tax, the *Capoeman* court noted that adding a tax to the product of the land set aside by the treaty would "erode" the "major value" of the land. "The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him." *Id.* at 10. Similarly, to take a valuable portion of the grant to the Cherokee Nation without compensation would alter the purpose for which Congress set aside the land originally. *See also Moore v. United States,* 157 F.2d 760 (9th Cir. 1946).

Indeed, the Supreme Court has recognized that Indian treaty rights are a form of property protected by the Fifth Amendment. *See Menominee Tribe,* 391 U.S. at 413; *Shoshone Tribe,* 299 U.S. at 497. Moreover, the Congressional power of eminent domain is strictly construed when Indian trust property is at issue. *United States v. Creek Nation,* 295 U.S. 103, 110 (1935). Thus, if the effect of exercising a navigational servitude is to alter or extinguish rights secured by treaty and unrelated to the power to use

without the express authorization of Congress, just compensation is required.[9] To create as sweeping a power for which the government here argues in the light of these constitutional safeguards would distort the very nature and scope of the navigational servitude.

B.

The exercise of the navigational servitude must also be examined within the context of the trust relationship between the Cherokee Nation and the federal government. Although the Cherokee lands were allotted, Congress provided that the remaining unallotted tribal property would "be held in trust by the United States for the use and benefit of the Indians." Act of April 26, 1906, § 27, 34 Stat. 148, cited in *Choctaw Nation,* 397 U.S. at 627. This trust responsibility articulated in the earliest Indian cases[10] mandates not only a standard of conduct but also a limitation of Congressional power. In *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980), the Supreme Court stated that in every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to the Congressional power to control and manage the tribe's affairs. "[T]his

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[9] Congress must specifically authorize the taking of Indian trust property. *United States v. Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941). *See also Winnebago Tribe of Nebraska, supra.* In *Winnebago,* the court held that the United States, through the Army Corps of Engineers, was without authority to take tribal lands by eminent domain without an express Congressional authorization for a project authorized by the 1944 Flood Control Act, which similarly authorized construction of the McClellan-Kerr Navigation Project.

[10] *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886). Justice Marshall's early characterization of these "domestic dependent nations . . . in a state of pupilage" best resembling the relationship of "a ward to his guardian" is often quoted.

power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *Id.* at 415.

The Cherokee Nation contends that a fiduciary relationship between the United States and the tribe imposes a distinct obligation on the government in dealing with dependent Indian wards. Like any other trust relationship, the United States, as trustee, is obligated to act for the benefit the of the tribe absent Congressional authorization to the contrary. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 356 (1941). Congress did not include an authorization to take, compensation for the taking, or a statement of overriding public need as related to these particular lands when it enacted the 1944 Flood Control Act and designated the Arkansas River Project. *See Winnebago Tribe of Nebraska, supra.*

The government urges that the Cherokee Nation's reliance on fiduciary principles is misplaced and that we should look solely to constitutional law to define the tribe's property rights in the river. To the contrary, the Cherokee Nation's constitutionally protected property rights are subject to Congress' power to control and manage. *Creek Nation,* 295 U.S. at 109-110. "[T]hat power does not extend so far as to enable the government 'to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.' " *Shoshone Tribe,* 229 U.S. at 497 (citation omitted). Nor can that duty be preempted and subsumed by the navigational servitude.

C.

The government argues that there are no exceptional circumstances present in this case to remove its scrutiny from the routine analysis given any application of a naviga-

tional servitude. We believe that the language of *Choctaw Nation* and *Montana* refutes this contention. Our result is hinged on this precedent. The Cherokee Nation has never asserted exclusive use or control of the Arkansas River, nor has it denied the power of the federal government to exercise its dominant control over interstate commerce. Instead, the Cherokee Nation maintains that its title to part of the Arkansas River makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe. Contrary to the government's inference, this status has not been lost simply because the tribe has not excluded navigation. The Cherokee Nation has not contested the government's right to use the navigable waters, but complains only of the effect of that use on its property interest.

The government finally warns that if we affirm the district court, we give leave to untold numbers of tribes seeking compensation for similar activity on waterways in their lands. Yet, from all we have said, it should be clear the result here is tied to and limited by the unique circumstances of Cherokee history and the terms of the treaty patent. Whatever other actions our holding might generate cannot preclude a just result in this case.

The government asks us to disregard the absolute grant in the treaty, the rules of construction of treaties, and the trust relationship, each a separate check on Congressional power, to hold that the navigational servitude represents a preemptive power exempting it from liability. This we cannot do. We do not question the exercise of the navigational servitude to improve the navigation in the Arkansas River. We do question the impact of that exercise on the subservient property. We hold the navigational servitude does not exempt the United States from liability for the alleged taking of tribal property.

IV. Conclusion

The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value. This right arises out of, and is circumscribed by, the Treaty of New Echota, and has nothing to do with riparian rights normally flowing from the ownership of property adjacent to waterways.

In light of this holding, it remains for the trial court to determine whether and to what extent the Cherokee Nation has been injured by the exercise of the navigational servitude. This will require a factual inquiry not dissimilar from that undertaken in an ordinary condemnation case. The trial court will also have to consider the second question raised but reserved during the course of this appeal, and that is whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact. The result reached by the trial court on the issue appealed is affirmed.

84-2355

CHEROKEE NATION OF OKLAHOMA

v.

UNITED STATES OF AMERICA

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the position taken by the majority for the reasons hereinafter expressed.

This is an action for compensation for property used by the United States in the Arkansas River Navigation Project. The plaintiff asserts that the Arkansas River is a "private stream" belonging to the Cherokees because they own the stream bed under a title acquired from the United States. Plaintiff nevertheless acknowledges that it is a navigable river. The Government argues that its exercise of the navigational servitude rights under the Constitution is founded on improvements to navigation directed by Congress on a navigable river and thus the nature of the ownership of the stream bed or how such title may have been acquired is not significant.

The improvements to navigation on the Arkansas River have extended over a long period of time. The river is one of the great rivers of the country and provided access from the Mississippi to the West since early times. The river traffic is now large. The improvements to navigation with which we are here concerned were directed by Congress in 1946 (Act of July 24, 1946). The Project completed in 1971 was known as the McClellan-Kerr Arkansas River Navigation System. There can be no serious challenge to the fact that Congress determined that the Project was for the benefit of navigation and that this was a "legislative judgment." United States v. Twin City Power Co., 350 U.S. 222.

The plaintiff herein was one of the petitioners in Choctaw Nation v. Oklahoma, 397 U.S. 620, decided by the Supreme Court in 1970. The Court there held after considering the treaties and patent:

> "[T]he United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River . . . in the grants it made to petitioners."

397 U.S. at 635-36. By this litigation which concerned only the bed of the river, it was determined that the Cherokees received title by patent to the entire river bed of the Arkansas from the Grand River to the Canadian River and the North one-half of the bed from the Canadian to the Arkansas-Oklahoma State line as against the claim of the State of Oklahoma. This title was a determinable fee and was an execution of the title obligations in the several treaties. The patent, of course, covered a large tract of land of which the disputed stream bed was a small element.

The Cherokee lands were made subject to allotments to individual Indians beginning about 1898 (30 Stat. 495) as was done generally throughout the country as a matter of policy. (See the General Allotment Act of 1887.) Much of the land was allotted and the remainder is held in trust by the United States for the Cherokees. The Tribe ceased to exist as a governmental entity in 1906 but was later reorganized.

This action is based by plaintiff on its undisputed ownership of the bed of the Arkansas River. The claim apparently is not based on riparian ownership, but it is obvious that the plaintiff was at one time a riparian owner and may be now as to some tracts. But, in any event, the nature and source of plaintiff's title makes no real difference.

All concerned acknowledge that the Arkansas River in this area is navigable. It carries a substantial tonnage of

freight and has been an active waterway since the settlement of the West. The Court in *Choctaw,* as indicated, was concerned with title to the stream bed but nevertheless stated:

> "Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce."

397 U.S. at 635. The Cherokees, as stated in Cherokee Nation v. Oklahoma, 402 F.2d 739, 745 (10th Cir.), had taken the position that the ownership of the stream bed was "not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause."

In any event, in this country navigable rivers are "public property" and have been since the earliest time. Gilman v. Philadelphia, 70 U.S. 713; United States v. Rands, 389 U.S. 121. Navigation on such rivers has been under the exclusive control of the federal Government—of Congress—under the Commerce Clause. Gibbons v. Ogden, 22 U.S. 1.

In United States v. Rands, 389 U.S. 121, 122-23, the Court said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' *Gilman* v. *Philadelphia,* 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239, 249 (1954), which ex-

> tends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States,* 166 U.S. 269, 275-276 (1897)."

The Court on this subject has relied frequently on United States v. Chicago, Milwaukee, St. Paul & P. R. Co., 312 U.S. 592. The opinion in that case considers several issues here raised. The Court there in part said, at 596-97:

> "And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone. Whether, under local law, the title to the bed of the steam is retained by the State or the title to the riparian owner extends to the thread of the stream, or, as in this case, to low-water mark, the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.
>
> . . . .
>
> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation."

The Court there held that the determination of the need for improvement to navigation "is for Congress alone." The navigational servitude doctrine then becomes ap-

plicable within its prescribed geographical scope as it was stated in United States v. Rands, 389 U.S. 121, 123:

> "The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid."

Thus the challenges are to the nature and location of the property used by the Government when its owners seek an exception to the application of the servitude. There appears to be no balancing of public good against private interest in these instances, but instead the issue is whether the segment or interest is within the definition and scope of the doctrine geographically as the above quotations demonstrate. Kaiser Aetna v. United States, 444 U.S. 164, is a variation on the geographical limitations of the doctrine.

The navigational servitude power has been exercised and upheld in cases where States own the bed of the stream. We have considered Montana v. United States, 450 U.S. 544, 555, and noted the statement therein that the power exists "regardless of who owns the riverbed." The other cases concerning State ownership of the riverbed are basically the same. There is nothing unusual in having the ownership of a navigable stream bed vested in an entity other than the United States, and this makes no difference in the application of the power including those situations where a State owns the riverbed. *See also* United States v. Holt State Bank, 270 U.S. 49, and United States v. Oregon, 295 U.S. 1. Since the United States may use the doctrine of navigational servitude against the States it must also be applicable against the Cherokees in this case.

The Cherokees here assert that they are a sovereign nation and the doctrine cannot be used against them. The Court considered such a position in Montana v. United States, 450 U.S. 544, 563, and referred to United States v. Wheeler, 435 U.S. 313, 323, where it was said that Indian

tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Wheeler* also stated that the Indian tribes had lost many of the attributes of sovereignty. Again in Montana v. United States, 450 U.S. 544, 564, the Court said:

> "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

The Court quoted Mescalero Apache Tribe v. Jones, 411 U.S. 145, and other cases.

There would seem to be no basis by reason of the status of plaintiff to limit the application of the navigational servitude nor its consequences.

If the Indians in Montana v. United States, 450 U.S. 544, would have had title to the riverbed it would have made no difference in the application of the navigational servitude. As the Court there said, at 555:

> "As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as 'absolute and undisturbed use and occupation' and 'no persons, except those herein designated . . . shall ever be permitted,' whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this 'right of exclusivity' could not have the meaning that the Court of Appeals ascribed to it."

Again the exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject.

The plaintiff seems to argue that the United States somehow bargained away this power to control and improve navigation and bargained away the public nature of the Arkansas River. But again, the title elements of the several treaties were executed and the obligations merged in and were discharged by the conveyance of title to the Cherokees. There is nothing more now to add to the title to make it a "fee plus." There is no residual element in the treaties as to title. The fact that the *Choctaw* court considered history and the treaties to arrive at its conclusion and may have considered them unusual as to the title to the bed of the river does not here increase the extent or nature of the Cherokees' title which passed by the patent in 1836 as the *Choctaw* court decided. Thus the treaty rights are in the patent. The Cherokees thus on this issue are no different than would be any other entity with title to the riverbed. There is no authority and no basis for an exception to the public nature of the navigable river to create a "private river" as plaintiff urges nor to create an exception to the application of the navigational servitude because plaintiff is an Indian tribe.

There would seem to be no issue in this appeal as to the trust obligations of the United States. This matter was not considered by the trial court and there seems to be no ownership interest to be derived therefrom.

I would reverse the trial court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Misc. No. 84-8023

CHEROKEE NATION OF OKLAHOMA,
RESPONDENT,

v.

UNITED STATES OF AMERICA,
PETITIONER.

SEPTEMBER TERM—October 4, 1984

Before Honorable William H. Holloway, Jr., Chief Judge, and Honorable William E. Doyle, Circuit Judge.

This matter comes on for consideration of the petition for leave to appeal pursuant to 28 U.S.C. § 1292(b) filed in the captioned miscellaneous case.

Upon consideration whereof, it is ordered that the petition for leave to appeal is granted.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 83-306-C

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT.

Filed June 13, 1984

AMENDED
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Both parties agreed, during a pretrial conference, that the case should be bifurcated and that the liability phase should be resolved on cross motions for summary judgment.

The legal issues facing the court are:

1. Whether the United States' navigational servitude in the Arkansas River prevents liability for an alleged fifth amendment taking of land held in fee by the Cherokee Nation?
2. Whether the exercise of a navigational servitude constituted the breach of some duty of care to plaintiff?

The parties agree there are not factual issues in dispute and submitted, in response to a court order, their motions

and supporting briefs concerning the above two issues of law. The question of damages is not addressed in this order and will be resolved at a later date.

In 1957, pursuant to the Flood Control Act of 1944, 58 Stat. 883, 890, and The River and Harbors Act of 1946, 60 Stat. 634, 636, defendant, acting through its United States Army Corps of Engineers, constructed a series of locks and dams on the Arkansas River on lands owned in fee simple by the Cherokee Nation. Defendant did not request permission from the Cherokee Nation to build said locks and dams, and did not compensate the Cherokee Nation for that activity.

Defendant asserts it is entitled to construct said locks and dams without compensating the plaintiff pursuant to its navigational servitude, a power reserved to it under the Commerce Clause of the Constitution. *See United States v. Rands*, 389 U.S. 121, 122 (1967).

In *Choctaw Nation, et al., v. United States*, 397 U.S. 620 (1970), the United States Supreme Court held that by the patent to the Cherokee Nation the United States granted fee simple title to the bed and banks of the navigable Arkansas River within the borders of the State of Oklahoma. By so holding, the Court created a unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging exclusively to the Cherokee Nation. By transferring fee simple title absolute, via treaty with a sovereign Cherokee Nation, the United States government can only impose restrictions or servitudes which were reserved to it in the treaty or patent. *See Shively v. Bowlby*, 152 U.S. 1 (1894). Although the treaty did reserve limited specific easements and right of passage, it did not provide for navigational servitude. *See* Treaty of New Echota, 7 Stat. 478 (December 29, 1835).

Defendant argues that the *Choctaw Nation* case, *supra*, specifically held the applicable portion of the Arkansas River to be subject to navigational easement, citing the following language:

> Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce.

397 U.S. 620, 635.

The issue in *Choctaw Nation*, however, was ownership of the bed and banks of the river. Navigational servitude was not an issue before the court and was not briefed by the parties. Accordingly, the court's remark is merely dictum and is not controlling law in this case.

Defendant cites numerous cases which support its argument that navigational servitude is a paramount right which need not be reserved by contract or treaty. Defendant's cases, however, all deal with public navigable waterways flowing over privately-owned beds, or along privately-owned banks.

This is a unique case in which a private waterway, together with its bed and banks, is owned, not by a private person or entity, but by a sovereign nation. Defendant's cited cases are inapplicable to this situation and do not serve as precedent.

Since a navigational easement was not reserved to the United States under the treaty and patent, its actions above amount to a taking of private property and it must pay just compensation to the Cherokee Nation, the fee title owner, under the Fifth Amendment to the Constitution of the United States. *See Kaiser Aetna, et al., v. United States*, 444 U.S. 164 (1979).

Accordingly, the court grants summary judgment in favor of the plaintiff as to the issue of liability only, and denies defendant's motion for summary judgment on the same issue.

Since the court bases its decision on the grounds stated above, it does not address the second issue.

It appears to this court that the order granting summary judgment against defendant on the issue of liability involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. Accordingly, defendant has ten days to file an interlocutory appeal of this order. 28 U.S.C. § 1292(b). The action is hereby stayed during the pendency of its appeal.

IT IS SO ORDERED this 13th day of June, 1984.

Frank H. Seay
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2355
(D.C. #83-306-c)

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

NOVEMBER TERM – January 23, 1986

Before Honorable John P. Moore, Honorable Oliver Seth, Circuit Judges, and Honorable Richard P. Matsch, District Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk

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* Of the United States District Court for the District of Colorado, sitting by designation.

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(2)

Supreme Court, U.S.
FILED
JUN 23 1986
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No. 85-1940

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER
v.
CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHEROKEE NATION IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable for a taking, under the Fifth Amendment, of fee simple lands of the Cherokee Nation held in trust for it by the United States.

PARTIES TO THE PROCEEDING

The Petitioner is the United States of America. The Respondent is the Cherokee Nation of Oklahoma.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1940

UNITED STATES OF AMERICA, PETITIONER
v.
CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHEROKEE NATION IN OPPOSITION

The Cherokee Nation of Oklahoma, submits this brief in opposition to the United States of America's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT

For centuries before the establishment of the United States of America, the Cherokee people lived on lands situated in the present-day states of Kentucky, Tennessee, North and South Carolina, Virginia, Alabama and Georgia. By 1700, the Cherokees controlled over 70,000,000 acres of hunting domain.

Then, beginning in 1785, the fledgling government of United States entered into a period of treaty-making with the Cherokees. Over the next 50 years, a series of

such treaties were negotiated in which the boundaries between the United States and the Cherokee Nation were repeatedly redefined. As white settlements grew in the eastern United States, the pressure to occupy Cherokee lands increased. In 1802, the State of Georgia and the federal government of the United States entered into an agreement known as the "Georgia Compact" in which the federal government promised to extinguish Indian title to certain Cherokee land within that state, even though no procedure was ever specified for accomplishing this task.[1]

By 1817 a treaty was signed which caused a number of Cherokees to exchange their lands in Georgia for equal portions within the Arkansas Territory.[2] However, since the majority of the Cherokees remained east of the Mississippi River at this time, in the eyes of many the "problem" of dealing with these sovereign people called Cherokees persisted. With the election of Andrew Jackson in 1828, it soon became evident that the Indians would be forcibly removed to the West.

Further encroachment of white settlers in Arkansas eventually prompted another treaty in 1828, wherein Cherokee lands in Arkansas were to be exchanged for over seven million acres of land in Indian Territory, now the State of Oklahoma and an outlet to the West.[3] Therein the United States "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged." (*id.* Art. 2) The intent of the parties is apparent even today:

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1. 28 Am.St. Papers, Public Lands Vol. 1, 7th Cong., 1st Sess. 125 (1802)

2. Treaty with the Cherokees, July 8, 1817, 7 Stat. 156, 2 Kapp. 140

3. Treaty with the Cherokees, May 6, 1828, 7 Stat. 311, 2 Kapp. 288

> . . . a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever - a home that shall never, in all future time, be embarrased by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, . . . (*id.* at preamble)

On May 28, 1830, Congress passed the Indian Removal Act. ch. 148, 4 Stat. 411, which authorized the President to exchange territory west of the Mississippi River for the eastern lands of Indian tribes including the Cherokee Nation. Federal protecton was withdrawn in the east and the States of Georgia, Mississippi and Alabama extended their laws over Cherokee domains. The United States refused to intervene. See, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 642-643 (1970). The Georgia legislature passed certain laws having the effect, if not the design, of harassing the Cherokees. [4]

In 1833 the United States settled a boundary dispute between the Cherokees and Creeks relative to their western domains and again "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby pledged, ..." Treaty with the Western Cherokee, Art. 1, February 14, 1833, 7 Stat. 414 , 2 Kapp. 385.

In 1835 the United States imposed upon the Cherokee Nation the Treaty of New Echota. [5] By the terms of this

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4. Georgia law abolished Cherokee government, extended its laws over Cherokee domain, and distributed Cherokee lands among five Georgia counties. *Compilation of Laws of the State of Georgia* (1819-1829) 198 (Dawson 1831)

5. Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp. 439.

treaty, the Cherokee ceded to the United States all their remaining lands in the east, and agreed to remove to and unite with the western Cherokees on lands described in the treaty. The United States agreed that the Cherokee Nation would have the right of self-government within its domain, and that its western domain would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." (*id*. Art. 5) The United States further promised that the Cherokee would "be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States." (*id* Art. 6) The treaty reserved only:

> . . . the right to make and establish such post and military roads and forts in any part of Cherokee country, as they may deem proper for the interest and protection of the same . . . provided that if the private rights of individuals are interferred with, just compensation therefore shall be made.

Id. Art. 3.

This series of treaties culminated in a patent from President Martin Van Buren on behalf of the United States granting fee title to the Cherokee domain in Indian Territory in 1838. (Appendix A) The patent conveyed over fourteen million acres of land in the northeastern quadrant of what is now the State of Oklahoma and provided that the Cherokee Nation, "HAVE AND HOLD THE SAME...FOREVER." (*ibid.*) The patent expressed the following reservations:

> (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities . . .

Choctaw Nation v. *Oklahoma*, 397 U.S. 620, 636-637 (J. Douglas concurring) (1970)

Eventually the new domain in the west was surrounded by white settlements and the United States attacked "as absurd" the Cherokee treaties and the solemn guaranties contained therein that the western Cherokee domain "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory," and the right of the Cherokee Nation to self-government under its own laws. *Id.* at 640-641.

In 1893 Congress appointed the Dawes Commission to effect the extinguishment of tribal title and enable the ultimate creation of a state. Act of March 3, 1893, ch. 209, 27 Stat. 612, 645. But, the commission found tribal members generally reluctant to accede to the wishes of the government. *Seminole Nation* v. *United States*, 102 Ct.Cl. 565, 628-629 (1945).

So, Congress next passed the Curtis Act[6] directing the allotment. Cherokee lands were ultimately alloted in 1902 to individual members of the tribe and the United States assumed full administrative control over the property and affairs of the Cherokee Nation.[7] The bed of

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6. Act of June 28, 1898, ch. 517, 30 Stat. 495; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306-308 (1902)

7. Cherokee Agreement of July 1, 1902, 32 Stat. 716.

the Arkansas River remained unalloted and was held in trust by the United States for the Cherokee Nation. [8]

A dispute arose shortly after Oklahoma became a state, wherein ownership of the riverbed was questioned The Secretary of Interior erroneously concluded title had passed to Oklahoma at statehood pursuant to the so-called "Equal Footing Doctrine". [9] This erroneous conclusion was affirmed in various Oklahoma Supreme Court cases from shortly after statehood (1907) through 1940's. [10] While the Cherokees continued to assert title, it was not until 1966 when Oklahoma agreed to waive sovereign immunity that the issue was submitted for a judicial determination.

In 1966 the Cherokee Nation sued the State of Oklahoma for an accounting for the income it was receiving from oil and gas development of the Arkansas riverbed within its domain. The State answered waiving its immunity and asking federal district court to quiet title to the riverbed in it under the Equal Footing Doctrine. The Choctaws and Chickasaws intervened with like claims.

Following adverse decisions in both the district court and the court of appeals, this Court reversed, holding that the Cherokee, Choctaw and Chickasaw Nations were the joint owners of the riverbed and that the United States had ceded the tribal titles to their

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8. *Choctaw Nation*, 397 U.S. at 628; *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 677 (1972), cert. denied, 409 U.S. 1039.

9. Letter dated March 26, 1908 from acting Commissioner of Indian Affairs, Honorable C.F. Larrabee, to the Secretary of Interior, Honorable Jesse E. Wilson. Approved March 27, 1908.

10. *State of Oklahoma* v. *Nolegs*, 40 Okla. 479 (1914); *Vickery* v. *Yahola Sand and Gravel Company*, 12 P.2d 881 (1932); *Lynch* v. *Clemants*, 263 P.2d 153 (1953).

respective domains in present Oklahoma to the tribes by the treaties of the early nineteenth century and later confirmed by patents which included the subject riverbed. [11]

On remand the State was not satisfied with the district court determination that the tribes held present title. But, the issue was affirmed by the court of appeals and certiorari denied by this Court, December 4, 1972. [12] On second remand the district court approved an accounting by the State regarding leasing income. The court of appeals affirmed and certiorari was again denied by order of June 10, 1974. [13] Thereafter, a special three judge panel decided a collateral dispute between the Cherokees and the Choctaws and Chickasaws regarding the lower region of the riverbed. The panel determined that the Cherokees held title to the north half of this portion. [14]

During the years 1973, 1974 and 1975, Congress appropriated the sum of $440,000.00 and ordered the Department of Interior to do a complete appraisal and evaluation of this property. The appraisal, which determined the total value of the riverbed itself to be $177 million was completed in 1975 and accepted by the tribes. [15]

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11. *Choctaw Nation*, 397 U.S. at 633-635.

12. *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 678 (1972) cert. denied, 409 U.S. 1039 (1974).

13. *Choctaw Nation* v. *State of Oklahoma*, 490, F.2d 521, 527 (1974) cert. denied, 417 U.S. 946 (1974).

14. *Choctaw Nation* v. *Cherokee Nation*, 393 F.Supp. 224, 246 (E.D. Okla. 1975)

15. This figure is the compilation of various reports conducted by independent contractors under contracts with the Bureau of Indian Affairs. The Tribes did not participate in the selection of these contractors. An additional study was completed in 1984 by W.R. Holway and Associates based on fair royalty value. The entire royalty value is estimated to be $108 million of which the Cherokee interest is approximately $60 million.

In 1976 the Cherokees were invited by the Secretary of Interior to settle a claim of sand and gravel deposits lost during construction of the navigation system. The Cherokees were advised that it would be in the best interests of the United States if the tribe would sell all of its mineral interest to the government so that future production would not interfere with the navigation way. An agreement was drafted with the help of the Solicitor and submitted but rejected by a new Secretary of Interior on grounds that he lacked authority to enter the agreement without congressional approval.

Thereafter, with assistance from the Department of the Interior, a congressional delegation drafted Senate Bill 660 and companion House Bill 4377, 95th Congress, 1st Session, to authorize the Secretary of Interior to enter into agreements with the three tribes for the use, lease or purchase of this property. Surprisingly, the representative from the Department of the Interior announced at a Senate hearing on this bill that legislation was not necessary and that the department would prefer to negotiate.[16]

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16. *Arkansas Riverbed Rights of Cherokee, Choctaw and Chickasaw Nations: Hearing before the United States Senate, Select Committee on Indian Affairs*, May 25, 1977, p. 24:

> CHAIRMAN ABOUREZK. In your opinion is it the usual practice for the Corps of Engineers to compensate tribes without congressional authority, or should they have congressional authority? What is your view of that?
>
> MR. BUTLER. Mr. Chairman, it is my understanding that under the theory of navigational servitude, I am advised that it is not a legal base for compensation.
>
> I would, however, Mr. Chairman, like to point out that there has been ample precedent, in my judgement, for compensation of this type relative to, let's say, the Missouri River basin, the Pick-Sloan plan which compensation was provided to the Indian owners of the inundated lands under the Celillo Falls inundated of the Columbia River. There are two examples to my knowledge of the power

Pending enactment of Senate Bill 660, there was a second attempt to settle with the Cherokees for their interest in the destroyed sand and gravel deposits. On November 4, 1977, the Assistant Secretary for Indian Affairs, proposed a settlement agreement wherein the United States would pay $8,453,818.88 representing the royalty value of the Cherokee interest in that portion of those minerals taken or destroyed. The Cherokee Tribal Council approved and returned the agreement on January 14, 1978. The Cherokees were later advised that Interior would not sign this agreement.

Ultimately, the Senate and House legislation was not passed. However, Congress did grant the district court for the Eastern District of Oklahoma jurisdiction to hear all claims of the Cherokee Nation against the United States for damages under the broad jurisdictional provisions of the Indian Claims Commission Act, ch. 959,

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head compensation and the Yellow Tail Dam for the Crows, and for the Kerr Dam at the Flathead Reservation both in Montana. This is the Federal Power Commission Act.

CHAIRMAN ABOUREZK. Without authorization?

MR. BUTLER. No; that is with authorization.

CHAIRMAN ABOUREZK. So it is a practice to have authorization; is that right?

MR. BUTLER. Yes; there is ample precedent.

CHAIRMAN ABOUREZK. When did the Interior Department decide that legislation would not be necessary?

MR. BUTLER. With specific respect to S.660?

CHAIRMAN ABOUREZK. Yes.

MR. BUTLER. About 7 o'clock last night. I will be very candid with the committee. (laughter)

60 Stat. 1049-1050 resulting from construction of the navigation system.[17] (Appendix B)

The Cherokee Nation filed its Complaint on May 23, 1983, alleging that construction of the McClellan-Kerr Navigation System had created a loss of tribal assets in the Arkansas riverbed, held in trust by the United States for the nation of Indians, and constituted a taking of assets by the United States under the Fifth Amendment to the Constitution of the United States; a violation of its fiduciary relationship with the Cherokee Nation and a violation of the fair and honorable dealing clause of the Indian Claims Commission Act. (Appendix C). The United States answered that it had a navigational easement in the Cherokee domain, in the exercise of which no taking occured.

The district court ordered cross-motions for summary judgment considering (1); "Whether the United States navigational servitude in the Arkansas River prevents liability for an alleged taking of land held in fee by the Cherokee Nation?" and (2); "Whether the exercise of a navigational servitude constitutes the breach of some duty of care to plaintiff?"[18] (Petition App. 25a). The court found in favor of the Cherokees on the first issue and reserved ruling on the second, certifying the case for interlocutory review.

The court of appeals granted the petition of the United States and affirmed the district court on different grounds. The court disagreed with the lower court, holding that it was not necessary to reserve the servitude in the patent but holding nevertheless that

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17. Act of December 23, 1982 (Public Law 97-385, 97th Cong.) 96 Stat. 1944.

18. Section 2 Clause 5 authorizes adjudication of claims that are not recognized by any existing rule of law or equity. *Osage Nation* v. *United States*, 119 Ct. Cls. 592, 670-671, 97 F.Supp. 381 (1951) cert. denied, 342 U.S. 896; *United States* v. *Oneida Nation*, 217 Ct. Cls. 46, 65 (1978), 576 F.2d 870.

compensation is due for taking of the tribe's fee title, recognizing the uniqueness of the historical relationship of the parties and the fiduciary responsibility of the United States toward the Cherokee people.

ARGUMENT

1. The Decision Below is Correct;

The United States complains that the court of appeals decision "drastically alters the character of the navigational servitude," reducing it to "a mere right to ply the waters of navigable streams," that the "practical ramifications are serious," which "will expose the public fisc to multi-million liability," and "encourage similar suits by both Indian tribes and private parties, demanding comparable damages awards." (Petition p. 9).

The court of appeals has already answered these unreasonably alarming contentions (Petition App. 15a); "Yet, from all we have said, it should be clear the result here is tied to and limited by the unique circumstances of Cherokee history and the terms of the treaty patent." The decision of the court of appeals does not have broad application. It is unique to the circumstances present in this case. It is the law governing this case, and as such refutes the petitioner's assertions of broad "ramifications".

This Court has already distinguished this case from other cases, and pointed out the limited application of the decision. In *Montana* v. *United States*, 450 U.S. 544, 555-556 (1981), (footnote 5), this Court stated:

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

The decision in this case is limited exclusively to three of the Five Civilized Tribes: The Choctaw and Chickasaw Nations, and the Cherokee Nation, all of which were parties in *Choctaw Nation.*[19] All of the Five Civilized Tribes had similar treaty provisions granting fee title. The several patents issued to these tribes granted to them this fee simple title to their western domains, instead of the usual right of use and occupancy where fee title remained in the United States. Each of these tribes was also under the guardianship of the United States, wherein the United States owed a fiduciary duty to protect their tribal interests.[20]

Petitioner claims that the court of appeals relied on factors that are not relevant to a taking analysis. However, the existence of these factors between the United States and the Cherokee people, fee simple title in the Cherokees, the existence of vested treaty rights, and the fiduciary relationship in light of special historical circumstances unique to this case, cannot now be disregarded.

The facts are clear from the record. The Cherokee Nation received a fee simple absolute title directly from the United States by patent therefore no state rights are involved. The grant was made almost 70 years before Oklahoma joined the Union. The so-called "Equal Footing Doctrine" has no application here. Petitioner cites distinguishable cases where title passed through states of the union to ultimate riperian owners.[21] In

19. In *United States* v. *Hayes*, 20 F.2d 873, cert. denied, November 21, 1927, 275 U.S. 423, it was factually determined that the Arkansas was not navigable in the Creek Nation. The Canadian River runs through the Seminole Nation and is not considered navigable.

20. See, *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Choctaw Nation*, 397 U.S. at 627.

21. *United States* v. *Chicago, Milwaukee, St. Paul and Pacific R.R.*, 312 U.S. 592, 596 (1941); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60-61 (1913)

these cases the parties did not take title directly from the United States coupled with the promise that their lands would forever be free from state or territorial jurisdiction as did the Cherokees.

The element of fee title cannot be examined without considering treaty rights and the fiduciary relationship of the parties as the Petitioner would have this Court do. These three tribes have a vested property right in the banks and bed of the Arkansas River within their respective domains, held in trust for them by the United States. The court of appeals deferred to the emphasis that this court has already placed on the special circumstances surrounding these treaties coupled with certain well established rules governing interpretation of those rights. Surely the Cherokees did not believe that the United States intended to establish a public highway through their new nation when intruders were to be kept out by order of the President himself? *Choctaw Nation*, 397 U.S. at 630-631; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). The very purpose of these treaties would be compromised if valuable tribal assests belonging to the Cherokee Nation were allowed to be taken without compensation. Treaties with Indians must be interpreted to carry the full intention of Congress behind the grant.[22] Care must be taken to preserve property rights created thereby. Can Petitioner today apply the navigational servitude without compensation and ignore these rights?

Neither is the court of appeals' reliance upon the trust relationship between the United States and Cherokee people "misplaced" as Petitioner asserts. To ignore this status would deny the established obligation of the

22. "The language used in treaties with Indians should never be construed to their prejudice." *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956) citing *Worcester* v. *State of Georgia*, 6 Pet. 515, 582 (1832); "...that language is 'to be liberally construed, doubtfull expressions being resolved in the favor of the Indian's"; *Moore* v. *United States*, 157 F.2d 760, 762 (9th Cir. 1946) citing *Alaska Pacific Fisheries*, 248 U.S. at 89.

United States as previously declared by this Court. The applicable law is well settled by this Court in *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935).

> . . . The tribe was a dependent Indian community under the guardianship of the United States, and therefore, its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, *it was subject to . . . pertinent constitutional restrictions.* It did not enable the United States to give the tribal lands to others, *or to appropriate them to its own purposes,* without rendering, or assuming an obligation to render, just compensation for them; for that *"would not be an exercise of guardianship but act of confiscation". Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 307-308. (emphasis ours).

This Court has also recognized that in carrying out its treaty obligations with Indian tribes, the dealings of the United States are to be judged by "the most exacting fiduciary standards," quoting from *Meinhard* v. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546, the classic definition of the fiduciary relationship by Chief Judge (later Mr. Justice) Cardozo. *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942).

Both the navigational easement and the power to regulate Indian affairs have their origin in the same provision of the United States Constitution. Article 1, Section 8, provides that Congress shall have the power:

> (3) To regulate Commerce with foreign nations, and among the several States and with the Indian Tribes...

In *Creek Nation* v. *United States*, 78 Ct. Cls. 474 (1933), at p. 485, the court of claims held:

> That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294; *Lone Wolf* v. *Hitchcock*, 187 U.S. 533...

This power is not absolute, but subject to "pertinent constitutional restrictions". *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Cress*, 243 U.S. 316 (1916).

In this case, the court of appeals held, consistent with *Choctaw Nation*, that although the navigational easement was not expressly reserved in the Cherokee patent, the power to exercise it existed, but:

> When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due. *The navigational servitude is not without constitutional limitation.* Furthermore, if Indian property is taken for non-Indian use within this context,constitutional strictures are equally applicable.(emphasis ours) (Petition App. 10a).

This Court has also recognized that the navigational easement is not absolute. Petitioner admits this (Pet. 10-11). *Kaiser Aetna* v. *United States*, 444 U.S.164, 175 (1979):

> . . . this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated

> by the government, rather than remain disproportionately concentrated on a few persons."

Kaiser Aetna cites *Penn Central Transportation Co.* v. *New York City* 438 U.S. 104, 124 (1978)

Thus the court of appeals decision herein is based upon law already established. No new law is involved here, no conflict of decision is present, and no far-reaching precedent is established in this case. The decision merely holds that this private property which is held in trust by the United States for the Cherokee Nation subject to the unique historical relationship of the parties, cannot be taken without just compensation, regardless of the navigational servitude. As the circuit court stated: "Whatever other actions our holding might generate cannot preclude a just result in this case." (Petition App. 15a).

In his concurring opinion in *Choctaw Nation*, 397 U.S. at 643, Mr. Justice Douglas concluded:

> Only the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim.

The petitioner alarms the Court with a claim of the Colville tribe for damages of more than $130 million based on the United States construction of the Grand Coulee Dam on the Columbia River, citing *Confederated Colville Tribe of the United States*, No. 181-D (Claims Ct.) 39 Ind. Cl. Comm. 159 (1979). A reference to 39 Ind. Cl. Comm. 159 discloses that this was merely a proceeding on a motion of the Colvilles dated November 18, 1976 to amend the original petition, filed before the Commission on July 31, 1951, to separate the Grand Coulee Dam claim from other claims, and give it a

separate docket number 181-D. The Commission allowed the motion on November 18, 1976, 39 Ind. Cl. Comm. 166. No support for the statement that this claim involved $130 million was found, and this conclusion of the Petitioner is wholly unsupported by the record cited. This case of the Colvilles relates to the Columbia River and the State of Washington. Moreover, no "peculiar circumstances" are cited which are in any way similar to the Cherokee Treaties and patent issued thereto and involved in the Cherokee proceedings. This case had its beginnings even before *Choctaw Nation* in 1966. Certainly counsel, unfamiliar with the issues in the Colville case, should not be required to try that case in the present proceeding, the Colville case being wholly irrelevant, incompetent and immaterial to the issues in this Cherokee case.

Petitioner further states "the Department of the Interior believes that at least 12 other Indian tribes have substantial claims to ownership of lands beneath navigable waters, and consequently, could assert claims against the government for damage caused by navigational improvements." (Petition p. 19). Certainly counsel cannot in this litigation be concerned with any claims that "could" be asserted against the government. The present proceeding remains unique, in that only three of the Five Civilized Tribes, the original parties to *Choctaw Nation*, and owners of the fee simple title to the Arkansas riverbed in Oklahoma under the "peculiar circumstances" set forth in their respective treaties, can benefit from this present proceeding. Counsel for petitioner advanced similar statements before the court of appeals which answered succinctly:

> The government finally warns that if we affirm the district court, we give leave to untold numbers if tribes seeking compensation for

similar activity on waterways in their lands. Yet, from all we have said, it should be clear the result here is tied to and limited to the unique circumstances of Cherokee history and the terms of the treaty patent. Whatever other actions our holding might generate cannot preclude a just result in this case.

The government asks us to disregard the absolute grant in the treaty, the rules of construction of treaties, and the trust relationship, each a separate check on Congressional power, to hold that the navigational servitude represents a preemptive power exempting it from liability. This we cannot do. We do not question the exercise of the navigational servitude to improve the navigation in the Arkansas River. We do question the impact of that exercise on the subservient property. We hold the navigational servitude does not exempt the United States from liability for the alleged taking of tribal property.

Cherokee Nation of Oklahoma v. *United States*, 782 F.2d 871, 879 (10th Cir. 1986).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

James G. Wilcoxen
General Counsel for the Cherokee Nation

Paul M. Niebell
Counsel for the Cherokee Nation

APPENDIX A

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians**it was stipulated and agreed on the part of the United States, ** the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are** in the words following, that is to say:-

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three,** the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians,** SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits** the right is reserved to the United States to

permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS** hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land;**

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty.*

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may

deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall be made."-

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square** on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river;** thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas,** thence south fifty three degrees west, one mile, to a post** thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock** thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, *** thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of

the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high**thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river;** thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square** thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square** thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.-

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof**

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said

Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extend and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President — M. VAN BUREN

M.M. GARLAND
Recorder of the General Land Office

APPENDIX B

PUBLIC LAW 97-385-DEC. 23, 1982

Public Law 97-385
97th Congress

An Act

Conferring jurisdiction on certain courts of the United States to hear and render judgment in connection with certain claims of the Cherokee Nation of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That (a) notwithstanding section 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946, as amended (the Indian Claims Commission Act, 60 Stat. 1049, 1052; 25 U.S.C. 70k), jurisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commision Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; and also on any claim which the Cherokee Nation of

Oklahoma may have against the United States resulting from any action under section 14 of the Act of April 26, 1906 (34 Stat. 137, 142), wherein the United States gave away to third parties lands for what are known as station grounds of railroads, said lands being segregated from Cherokee Nation tribal lands without compensation to said Cherokee Nation of Oklahoma therefor; all of said lands or interests therein being held by said Cherokee Nation by virtue of treaties and by patent issued by the United States granting said lands to said Cherokee Nation in fee simple, or otherwise.

(b)Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act approved August 13, 1946 (25 U.S.C. 70k), the Court of Claims or the United States District Court for the Eastern District of Oklahoma shall have jurisdiction to the same extent as under subsection (a) of this Act to hear, determine, and render judgement on any claim of the Choctaw Nation and on any claim of the Chickasaw Nation against the United States for any damages to any tribal assets, lands, or interests of such Nations arising from the actions of the United States described in such subsection.

Approved December 23, 1982.

APPENDIX C

(CHAPTER 959)

An Act

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of

cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

*****

Supreme Court, U.S.
FILED
AUG 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1940

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

6/17

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REPLY MEMORANDUM FOR THE UNITED STATES

In our petition for a writ of certiorari, we explained that the United States' navigational servitude precludes the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in a compensable taking of instream tribal property. We demonstrated that the court of appeals' contrary conclusion is inconsistent with decisions of this Court interpreting both the navigational servitude and the scope of the Cherokee Nation's instream property interests (Pet. 9-18). In addition, we showed that the question presented here is important because the court's decision would expose the United States to multi-million dollar liability for traditionally noncompensable damages (*id.* at 18-19) and would ultimately upset the settled rules and expectations that govern construction of public navigation projects (*id.* at 19). The Cherokee Nation's brief in opposition has failed to overcome our submission that the court of appeals erred and the question presented warrants this Court's review.

1. The Cherokee Nation argues that the court of appeals reached a correct and uncontroversial result, stating that "[n]o new law is involved here, no conflict of decision is present, and no far-reaching precedent is established in this case" (Br. in Opp. 16). We emphatically disagree. As our petition explains (Pet. 9-14), the court of appeals' decision departs from the settled rule that the United States owes no compensation to parties who claim that the government's navigational improvements prevent or impair the use of property located within the bed of a naturally navigable body of water. This Court has made clear that the navigational servitude precludes compensation for a claimed taking of submerged lands, stating:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation.

United States v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596-597 (1941) (footnote omitted). See also, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-176 (1979) (quoting *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900); *United States* v. *Rands*, 389 U.S. 121, 123 (1967); *United States* v. *Willow River Power Co.*, 324 U.S. 499, 509 (1945); *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 87-89 (1913).

The Cherokee Nation contends that the settled rule is inapplicable here, characterizing it as resting on "distinguishable cases where title passed through states of the union to ultimate riparian owners" (Br. in Opp. 12 (footnote omitted)). However, as our petition explains (Pet. 14-16), the rule applies with equal force in this instance. This

Court's decisions indicate that the navigational servitude does not depend on the source of the claimant's title to submerged lands (see *id.* at 15 & n.12). The Cherokee Nation, like all other owners of land beneath navigable waters, took its riverbed interest subject to the United States' power under the Commerce Clause to regulate and promote navigation (see *ibid.*). Furthermore, and contrary to the Tribe's suggestion (Br. in Opp. 13-14), the United States does not violate its trust responsibilities to the Indian tribes by refusing to pay compensation for impairment of interests that, as a matter of law, are noncompensable (see Pet. 16).[1]

2. The Cherokee Nation also suggests (Br. Opp. 11-12, 16-18) that the issue presented in this case lacks importance sufficient to merit this Court's review. Again, we disagree. This case, even when viewed in isolation, presents an unusually large taking claim. The Tribe, relying on a private appraisal, contends that the government's navigational improvements have resulted in a $108 million loss in the *fair royalty value* of the riverbed (Br. in Opp. 7 n.15). The appraisal, however, uses this figure to reflect the Tribe's claim for damages through *1984*; the appraisal report further states that the Cherokee, Choctaw, and Chickasaw Nations are collectively entitled to *future royalties* of approximately *$140 million every 25 years.*[2]

---

[1]As our petition also explains (Pet. 17-18), the Cherokee Nation's present position directly conflicts with its previous representations to this Court in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). In support of its claim to ownership of the bed of the Arkansas River, the Tribe stated that "no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same" (Cherokee Reply Br. 13-14). The Tribe makes no attempt to reconcile its present position with its past statements to this Court.

[2]See 1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984). We have lodged a copy of volume 1 of the appraisal, which sets forth the relevant figures, with the Clerk of the Court. We do not, of course, necessarily agree with any of the estimates or conclusions contained therein.

Furthermore, as we explained in our petition (Pet. 12-14, 18-19), this case represents a significant departure from prior cases interpreting the navigational servitude that, if left uncorrected, could have serious ramifications beyond the present dispute. Although the Cherokee Nation contends that the court of appeals' decision "is unique to the circumstances present in this case" (Br. in Opp. 11), the court's opinion in fact broadly refashions the concept of the navigational servitude to reach its result. See Pet. 12-14.

The Cherokee Nation states it "cannot be concerned with any claims that 'could' be asserted against the government" (Br. in Opp. 17). The court of appeals, sharing this attitude, professed little concern over "[w]hatever other actions our holding might generate * * *" (Pet. App. 15a). We submit, however, that this Court should be concerned by the consequences of this case. For nearly a century, this Court has held that the United States may improve navigable waters free from takings claims by owners of the underlying lands. See Pet. 9-11. This long-settled rule serves to bind all persons and groups within the United States together as one nation and provides both the government and the owners of submerged land with clear guidance in planning their respective activities. The court of appeals' departure from this rule, with its consequent disturbance of legitimate expectations, presents an important federal question warranting this Court's review.

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, it is therefore respectfully submitted that the petition should be granted.

CHARLES FRIED
Solicitor General

AUGUST 1986

DOJ-1986-08

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1940

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CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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Petition for a Writ of Certiorari Filed May 23, 1986
Petition Granted October 6, 1986

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1940

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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* The opinions of the district court and the court of appeals have been reproduced in the appendix to the petition for certiorari. See Sup. Ct. R. 30.1. Respondent has reproduced the land patent from the United States to the Cherokee Nation, as well as Public Law 97-385 (conferring jurisdiction on the district court to hear this action) and provisions of the Indian Claims Commission Act, in the appendix to its brief in opposition.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 83-306-C

CHEROKEE NATION OF OKLAHOMA

v.

UNITED STATES OF AMERICA

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
5/23/83	COMPLAINT.
5/23/83	PRAECIPE For Summons.
5/23/83	ISSUING Summons (2) 60-day. (Given. to atty. for service).
6/7/83	Return on Summons: *served U.S. Atty.*, Muskogee, Oklahoma on *5/23/83*; served *Atty. Gen. of U.S.* by Certified Mail on *5/26/83*.
7/25/83	ANSWER of deft.
9/13/83	DOCKET mailed setting pretrial at Muskogee, Oklahoma on December 15, 1983 at 11:30 A.M.
9/29/83	MOTION of deft. to Strike date of Pre-Trial Conference.
9/29/83	Entering Order denying Motion of deft. to strike date of Pre-Trial Conference. (FHS) (Copies to counsel.)
11/21/83	JOINT PRETRIAL MEMO.

12/15/83	Said cause comes on for Pretrial: Plaintiff present by counsel, Andrew Wilcoxen. Defendant present by counsel, Terry Smith, (Corp. of Eng.) and Lynn Rubinstein. Court directs this matter stricken from the Pretrial Docket. Parties to file Briefs on Liability issue with primary emphasis on the navigation servitude issue, by Feb. 15, 1984. Further Parties to file Joint Motions for Summary Judgment by Feb. 15, 1984. Responses due March 30, 1984., with Reply if parties desire due Apr. 18, 1984. (FHS)
2/10/84	MOTION of Deft. for Judgment on the Pleadings.
2/10/84	BRIEF of Deft. in Support of Motion for Judgment on the Pleadings.
2/15/84	MOTION of Pltf. for Partial Summary Judgment as to Liability.
2/15/84	BRIEF of Pltf. in Support of Motion for Partial Summary Judgment.
3/30/84	RESPONSE of Pltf. to Defts. Motion for Judgment on the Pleadings
4/3/84	MOTION of defendant For Extension of time to file Response Brief and Reply Briefs.
4/3/84	Entering Order granting defendant an extension of time until May 14, 1984, to file its response to plaintiff's motion for partial summary judgment, and further granting an extension of time until June 11, 1984, for the parties to file reply briefs. (FHS) (Copies to Counsel).
5/14/84	MEMORANDUM by defendant in Opposition to Plaintiff's Motion for Summary Judgment and Reply Memorandum in Support of Defendant's Motion Judgment on the Pleadings.

6/6/84	ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT. (FHS)
6/13/84	ORDER (AMENDED) GRANTING Pltf's Motion for Partial Summary Judgment and denying deft's Motion for Partial Summary Judgment. (FSH) (Copies to counsel.)
6/19/84	(copy) Petition for Interlocutory appeal filed w/10th C. Court of Appeals from order 6/6/84.
10/9/84	Order of U.S. Court of appeals granting petition for leave to appeal. 84-2355
10/10/84	Forwarding Interlocutory Appeal consisting of one volume. (copies) (Copy of index in file) to Tenth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2355

CHEROKEE NATION OF OKLAHOMA

v.

UNITED STATES OF AMERICA

Chronological List of Relevant Docket Entries

DATE	FILINGS – PROCEEDINGS
10/4/84	CS.DKT – case docketed ROA.DUE – record on appeal due 10/14/84 DKT.ST.DUE – docketing statement due 10/25/84
10/11/84	*ROA.F* Record on appeal filed, Vol. I (Pleadings)(160pp); Orig.
10/11/84	NAPR.F Notice of Appearance filed by Wilcoxen attorney for Appellee
10/20/84	NAPR.F Notice of Appearance filed by Minear & Gelin as attys for Appellant
10/19/84	NAPR.F Notice of Appearance filed by Niebell as attorney for Appellee
10/25/84	DKT.ST.F Appellant's docketing statement filed, original + 6cc, cs
11/5/84	NAPR.F Notice of Appearance filed by Yaroschuk as atty for Appellee
2/15/85	O.ASGN.CAL. Order Assigned to Calendar B- Holloway (parties served by mail). BR.DUE Appellant's Brief Due 3/8/85.
3/8/85	BR.F Appellant's brief filed, orig. + 9cc, c/s

3/26/85	NAPR.F. Notice of appearance filed by James Wilcoxen, atty for appellee to replace attys. Andrew Wilcoxen & Michael S. Yaroschuk who have died.
	M.EXTM.BR.DISP. Appellee's motion for extension of time to 4/18/85 to file brief filed 3/25/85 & granted-HKP (orig & 3cc, c/s) (parties served by mail)
4/18/85	BR.F Appellee's brief filed, Orig. & 10cc., c/s.
5/3/85	BR.F Appellant's reply brief filed, orig. + 9cc., c/s.
6/11/85	HRG.SET.JULY'85 TERM, DENVER
8/6/85	CS.ARG.SUBM—Moore, Seth, Matsch
8/13/85	ADD.AUTH.F/SUBM. Appellees' supplemental authority filed 8/12/85 (orig) & submitted to panel.
1/23/86	OPN.F Published, signed opinion filed—Moore, Seth, Matsch, Writing Judge is Moore. (parties served by mail)
	DIS.OPN.F Published, dissenting opinion filed—Seth. (parties served by mail)
	JM.DISP Judgment is affirmed.
2/3/86	M.EXTM.F.P.REHRG.F/SUBM. Appellant's motion for extension of time to 3/10/86 to file petition for rehearing filed. O&3 c/s -and submitted to panel.
2/6/86	M.EXTM.F.P.RHERG.DISP. Granted appellant's motion for extension of time to 3/10/86 to file petition for rehearing. Moore, Seth, Matsch
3/11/86	MDT.ISS Mandate issued to district court
4/24/86	ROA.RTN.DC. Record on appeal returned to district court (Vol I)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 83-306-C

CHEROKEE NATION OF OKLAHOMA, PLAINTIFF,

v.

THE UNITED STATES, DEFENDANT.

[Filed May 23, 1983]

COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiff, Cherokee Nation of Oklahoma, respectfully represents as follows:

COUNT I

1. Pursuant to the Act of Congress, approved December 23, 1982 (Public Law 97-385, 97th Cong., 96 Stat. 1944), Congress conferred jurisdiction

> "[U]pon the United States District Court for the Eastern District of Oklahoma to hear, determine and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and power-

> heads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation; * * * all of said lands or interests therein being held by said Cherokee Nation by virtue of treaties and by patent issued by the United States granting said lands to said Cherokee Nation in fee simple, or otherwise."

2. Plaintiff, Cherokee Nation of Oklahoma, was originally located in the southeastern portion of the United States in what are now the States of Virginia, North and South Carolina, Georgia, Kentucky and Tennessee. Pursuant to a series of treaties with the United States, executed during the period 1817 and 1835, and under a patent issued by the United States thereunder in 1838, the Cherokee Nation was removed from its ancestral lands in the east and relocated on 13,594,135.14 acres of land in what was then known as Indian Territory, now a part of the State of Oklahoma.

3. During the period 1897-1906, the United States Congress enacted a series of Acts intended to establish a Cherokee tribal roll, to divide the tribal property among the enrolled members, to permit the formation and admission of the State of Oklahoma to the Union, which would include the people and lands patented to the Cherokee Nation. Under said Acts defendant, as trustee of plaintiff, assumed full administrative control over all of the property and affairs of the Cherokee Nation to carry out the purposes of said Acts. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902).

4. At all times mentioned herein plaintiff, the Cherokee Nation of Oklahoma, has maintained its existence as an identifiable nation of North American Indians, and presently has enrolled tribal members and a Constitution with a representative form of government,

approved by the United States Secretary of the Interior. Plaintiff maintains its tribal office and headquarters at Tahlequah, in the Eastern District of Oklahoma.

5. Plaintiff brings this lawsuit pursuant to its inherent power and authority as a sovereign Indian nation, and in accordance with the Act of Congress, approved December 23, 1982, 96 Stat. 1944, and the jurisdictional provisions of Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (25 U.S.C. 70a et seq.).

6. Defendant in this action is the United States of America operating through its various governmental and administrative agencies, such as the United States Army Corps of Engineers, the Department of the Interior, and the Southwest Power Administration.

7. Pursuant to the Treaty of New Echota, executed December 29, 1835, 7 Stat. 478 (2 Kapp. 439), the Cherokee Nation agreed to relinquish its ancestral lands in the east and to remove to lands west of the Mississippi River. The treaty in pertinent part stated:

> ". . . ."
>
> "Article 2. Whereas by the treaty of May 6th, 1828 and the supplementary treaty thereto of Feb. 14th, 1833 with the Cherokees west of the Mississippi the United States guaranteed and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country 'Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas;

thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

"*Provided however* That if the saline or salt plain on the western prairies shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

". . ."

"Article 3. The United States also agree that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830.

". . . ."

"Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them; provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same."

8. The Treaty of 1835 contained limited and specific easements and reservations with regard to gathering of salt on the Cherokee land, the rights to land assigned to the Quapaws, and, lastly, the right of the United States to establish military roads and posts, and to maintain the post at Fort Gibson.

9. On December 31, 1838 the promised patent was duly issued by the United States and recorded in the General Land Office conveying to the Cherokee Nation the above-described lands, as set forth in the Treaty of 1835. Said lands, thus described by metes and bounds, conveyed to the Cherokee Nation said 13,594,135.14 acres in what was then known as Indian Territory, now a part of the State of Oklahoma. Included within the metes and bounds description was the navigable portion of the Arkansas River. Said patent provided, with respect to the lands granted therein, that said Cherokee Nation was "to have and hold the same together with all rights, privileges and appurtenances thereunto belonging to said Cherokee Nation forever. . . ."

10. For more than fifty years the Cherokee Nation occupied the patented lands and as the fee simple owner exercised full dominion and control over such lands, including the navigable portion of said Arkansas River. Plaintiff at no time since 1835 divested itself of title to the bed and banks of said Arkansas River within the metes and bounds description of said patent.

11. By letter dated March 28, 1908, the Secretary of the Interior erroneously determined that the Cherokee Nation was not entitled to royalties from the excavation of sand and gravel because title to the bed of the Arkansas River within the Cherokee Nation passed to the State of Oklahoma upon its admission to the Union on an equal footing with the other states.

12. Defendant's Army Corps of Engineers, pursuant to the Flood Control Act of 1944, 58 Stat. 883, 890, and the River and Harbor Act of July 24, 1946, 60 Stat. 634, 636, constructed a series of locks and dams on that portion of the Arkansas River owned in fee simple by the Cherokee Nation, without its consent, and without the

payment of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States.

13. In 1970, the United States Supreme Court, in *Choctaw Nation et al. v. Oklahoma,* 397 U.S. 620, declared that the Cherokee Nation was the present owner of the fee simple title to the bed and banks of the Arkansas River within the territorial domain of the Cherokee Nation, and that the Cherokee Nation was entitled to an accounting for mineral royalties erroneously acquired by the State of Oklahoma.

14. In constructing the dams and locks on that portion of the Arkansas River flowing through the Cherokee National domain, and in altering the channel thereof, defendant has destroyed, or caused to be lost, vast deposits of sand and gravel constituting the valuable property of plaintiff, without payment to plaintiff therefor, and for which plaintiff herein demands just compensation.

15. At all times mentioned herein there has existed between plaintiff and defendant a fiduciary relationship, the defendant being the trustee and the plaintiff being its dependent Indian ward; that under such relationship the defendant has the right to preserve, manage and control the property and affairs of plaintiff for its benefit, but cannot destroy or dissipate said trust property, or use it for its own purposes, without providing just compensation to plaintiff therefor; that defendant, in violation of its duty as trustee herein has failed to exercise the highest fiduciary standards in destroying the property rights of plaintiff in that portion of the Arkansas River within the national domain of plaintiff; and its dealings with plaintiff's riverbed property is in plain violation of fair and honorable dealings.

16. Defendant's United States Army Corps of Engineers has located locks and dams on plaintiff's Arkansas riverbed property, without plaintiff's consent

and without providing just compensation therefor; and such structures have constituted a continuing trespass, and continue presently to constitute a continuing trespass on said property of plaintiff; and such actions of defendant continue to deprive plaintiff of the benefits to be derived from its fee simple title to said property.

COUNT II

17. Plaintiff incorporates by reference herein paragraphs 1 through 7 of Count I.

18. Pursuant to the Flood Control Act of 1944, 58 Stat. 883, 890, and the River and Harbors Act of 1946, 60 Stat. 634, 636, defendant, through action of its United States Army Corps of Engineers, commencing in 1957, constructed a series of locks and dams on the Arkansas River designated as the Arkansas River Navigation System (the McClellan-Kerr Navigation Project) on lands owned in fee simple by the Cherokee Nation:

The Webbers Falls Lock and Dam, No. 16, located about five miles northwest of the Town of Webbers Falls, Muskogee County, Oklahoma;

The Robert S. Kerr Lock and Dam, No. 15, located at Short Mountain, about eight miles southerly from the Town of Sallisaw, Sequoyah County, Oklahoma; and

The W. D. Mayo Lock and Dam, No. 14, located about nine miles southwesterly of Fort Smith, Arkansas, in Sequoyah County, Oklahoma.

19. Said locks and dams described above are located in whole or in part on lands granted by the United States to the Cherokee Nation in the 1838 patent, and are still owned by plaintiff, Cherokee Nation of Oklahoma.

20. Defendant constructed said dams and locks without the premission or consent of plaintiff Indian nation. Said locks and dams, located as they are, on plaintiff's property constitute a taking without just compensation in violation of the Fifth Amendment of the

Constitution of the United States; and also constitute a breach of the fiduciary duty owed by defendant to plaintiff, its dependent Indian ward. Defendant's actions in permitting the destruction and dissipation of plaintiff's property violate the basic principles of fair and honorable dealing between plaintiff and defendant.

21. Plaintiff has been deprived of the use of its property by defendant's wrongful action in constructing said locks and dams, including, but not limited to, the private development of hydroelectrical energy.

22. The locks and dams constructed by defendant generate hydroelectric power which is marketed by the defendant's Southwest Power Administration to cooperatives and municipalities in the area. Plaintiff Indian nation has not been compensated for the loss and deprivation of this valuable property right in its said lands.

WHEREFORE, plaintiff prays:

1. That plaintiff be awarded just compensation from defendant for the fair market value of the Cherokee Nation's lands thus intruded upon by defendant, and taken by the United States Army Corps of Engineers in the construction of the locks and dams, Nos. 14-16, in violation of the Fifth Amendment to the Constitution of the United States;

2. That plaintiff be awarded just compensation from defendant for the fair market value of the Cherokee Nation's lands thus intruded upon by defendant, and taken by the United States Army Corps of Engineers in the construction of locks and dams Nos. 14-16, in violation of the principles of fair and honorable dealings between defendant and plaintiff, its dependent Indian ward;

3. That plaintiff be awarded just compensation for the past and future loss of the sand and gravel and coal deposits as a consequence of defendant's action in constructing said locks and dams and altering the channel of said Arkansas River; said assets thus lost to plaintiff and

taken by defendant without the payment of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States;

4. That plaintiff be awarded just compensation for the past and future loss of the sand and gravel deposits as a consequence of defendant's action in constructing said locks and dams and altering the channel of said Arkansas River; said assets thus being lost to plaintiff and taken by defendant without the payment of just compensation therefor, in violation of the principles of fair and honorable dealings between defendant and plaintiff, its dependent Indian ward;

5. That plaintiff be awarded just compensation for the fair market value of the damsites thus taken by defendant, and for the electrical energy generated at said sites, which property has been taken by defendant in violation of the Fifth Amendment to the Constitution of the United States; and

6. That plaintiff be awarded just compensation for the fair market value of the bed and banks of the Arkansas River, which defendant has taken from plaintiff in violation of the Fifth Amendment to the Constitution of the United States: and/or in violation of its duties as trustee of plaintiff, and contrary to the most exacting fiduciary

standards, and in violation of the principles of fair and honorable dealings between defendant and plaintiff, its dependent Indian ward.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 83-306-C

CHEROKEE NATION OF OKLAHOMA, PLAINTIFF,

v.

UNITED STATES, DEFENDANT.

[Filed July 25, 1983]

ANSWER

TO THE HONORABLE UNITED STATES DISTRICT COURT:

FIRST DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

SECOND DEFENSE

In constructing a series of locks and dams on the navigable reach of the Arkansas River in Oklahoma, the United States was exercising its rights under Article I, Section 8, Clause 3 of the Constitution of the United States.

THIRD DEFENSE

If any damages were sustained by plaintiff, it did not result from a taking of property in the stream bed, but from the lawful exercise of a navigational servitude, a power to which the bed of the Arkansas River has always been subject and for which no compensation need be paid.

FOURTH DEFENSE

The ruling of the Court in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), did not convey present title in the bed of the navigable portion of the Arkansas River to the Cherokee Nation.

FIFTH DEFENSE

There is no trust relationship between the United States and plaintiff in the bed of the Arkansas River.

SIXTH DEFENSE

Because plaintiff does not have present title to the bed of the Arkansas River and due to the United States' navigational servitude in that River, there has not been a trespass committed by defendant.

SEVENTH DEFENSE

Defendant answers, through its attorney, the allegation of the complaint as follows:

1. Defendant admits the allegations of paragraph 1.
2. Defendant admits the allegations of paragraph 2.
3. Defendant admits the allegations of the first sentence of paragraph 3. Defendant denies the allegations of the second sentence of paragraph 3.
4. The allegations of the first sentence of paragraph 4 are conclusions of law to which no reply is required. Defendant admits the allegations of the second sentence of paragraph 4.
5. The allegations of paragraph 5 are conclusions of law to which no reply is required.
6. Defendant admits the allegations of paragraph 6, but avers that the correct name of the last listed agency is the Southwestern Power Administration which, in 1977, was transferred from the Department of the Interior to the Department of Energy.

7. Defendant admits the allegations of paragraph 7 and avers that the Treaty speaks for itself.

8. Defendant admits the allegations of paragraph 8 and avers that the Treaty speaks for itself.

9. Defendant admits the allegations of paragraph 9 and avers that the Treaty speaks for itself.

10. Defendant denies the allegations of paragraph 10.

11. Defendant avers that the letter dated March 28, 1908 speaks for itself. The remaining allegations of paragraph 11 are conclusions of law to which no reply is required.

12. Defendant admits that the United States Corps of Engineers, pursuant to the Flood Control Act of 1944, 58 Stat. 883, and the River and Harbor Act of July 24, 1946, 60 Stat. 634, built a series of structures on the Arkansas River and that certain of these structures are situated within the navigable reach of the Arkansas River. Defendant denies that plaintiff is the present owner in fee simple absolute of the bed of the Arkansas River and denies further that plaintiff is entitled to any just compensation under any provision of the Constitution.

13. Defendant denies the allegations of paragraph 13.

14. Defendant denies the allegations of paragraph 14.

15. Defendant denies the allegations of paragraph 15.

16. Defendant admits that it has located certain locks and dams on the navigable reach of the Arkansas River. The rest of the allegations in paragraph 16 are denied.

17. Defendant incorporates by reference herein paragraphs 1 through 16.

18. Defendant admits the allegations of paragraph 18, except to deny that the project was built on lands owned in fee simple by the Cherokee Nation.

19. Defendant admits that the structures listed in plaintiff's paragraph 18 are located in whole or in part on lands granted by the United States to the Cherokee Nation in the 1838 patent, but denies that plaintiff still owns the land.

20. Defendant admits the allegations of the first sentence of paragraph 20, but denies all other allegations of that paragraph.

21. Defendant denies the allegations of paragraph 21.

22. Defendant admits that certain locks and dams located on the navigable reach of the Arkansas River do generate hydroelectric power and energy which is marketed by the Southwestern Power Administration under § 5 of the Flood Control Act of 1944, 16 U.S.C. 828s. Defendant denies the remaining allegations of paragraph 22.

All allegations which are not specifically admitted are denied.

Wherefore, defendant prays that this Court enter judgment for the United States, including attorneys fees and costs and other expenses which the Court determines to be appropriate.

Respectfully submitted,

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United States Attorney

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Assistant United States Attorney

/s/LYNN RUBINSTEIN

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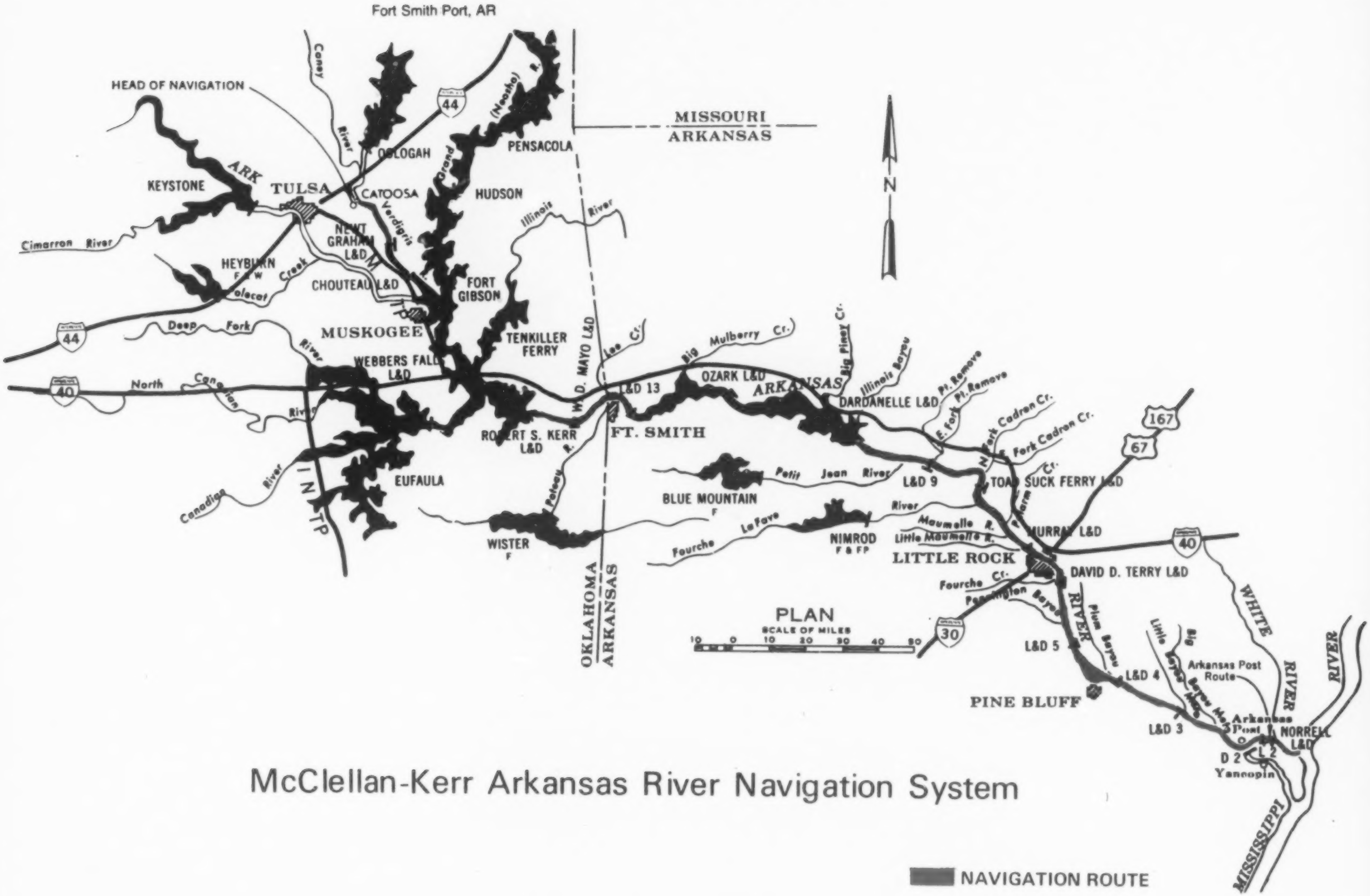
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been placed in the mail, postage prepaid, on July 22, 1983 to the following:

Andrew Wilcoxen
P.O. Box 357
Muskogee, Oklahoma 74402-0357

/s/ LYNN RUBINSTEIN
Lynn Rubinstein



McClellan-Kerr Arkansas River Navigation System

In the Supreme Court of the United States

No. 85-1940

UNITED STATES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ORDER ALLOWING CERTIORARI. Filed October 6, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Justice Scalia took no part in the consideration or decision of this petition.

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No. 85-1940

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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46 pp

QUESTION PRESENTED

Whether the United States' navigational servitude, which permits the federal government to improve navigable waters free from claims for just compensation, bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation System has resulted in compensable damage to instream tribal property interests.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1940

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 782 F.2d 871. The opinion of the district court (Pet. App. 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on January 23, 1986. On April 22, 1986, Justice White extended the time for filing a petition for writ of certiorari to and including May 23, 1986. The petition was filed on that date and granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in relevant part:

> The Congress shall have power * * *
>
> * * * * *
>
> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.

The Fifth Amendment provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

The Cherokee Nation of Oklahoma contends that the United States owes just compensation for impairment of instream tribal property resulting from the construction and operation of the McClellan-Kerr Arkansas River Navigation System (the McClellan-Kerr Project). The United States has responded that the federal government's firmly established power under the Commerce Clause to improve navigable waters free from suits demanding compensation for resulting instream property damage—the so-called "navigational servitude"—bars the Cherokee Nation's claim. The district court disagreed, holding that the United States had failed to preserve its navigational servitude in the relevant Indian treaties and patents (Pet. App. 25a-28a). A divided court of appeals affirmed on different grounds, holding that the Cherokee Nation is subject to the navigational servitude, but the Tribe nonetheless "has a right to compensation for any consequent loss of property or diminution of value" to tribal interests resulting from the navigation project (*id.* at 23).

A. The McClellan-Kerr Project

The McClellan-Kerr Project is an extensive congressionally authorized navigational improvement program that links the Southern Plains states with the nation's inland waterway system.[1] The project is one of the country's largest and most important navigational improvement undertakings. It represents the culmination of congres-

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[1] A map of the McClellan-Kerr Project is provided in the Joint Appendix (J.A. 22).

sional efforts, begun early in the nineteenth century, to realize the full commercial potential of the Arkansas River.

1. The Arkansas River originates high in the Rocky Mountains, near Leadville, Colorado, and flows southeasterly more than fourteen hundred miles through Kansas, Oklahoma and Arkansas. It is the Nation's fifth longest and thirteenth largest waterway, draining an area of more than 160,000 square miles. It is naturally navigable from its confluence with the Grand River, near Fort Gibson, Oklahoma, to its confluence with the Mississippi River. *Brewer Oil Co.* v. *United States*, 260 U.S. 77, 86 (1922).

Steamboats first appeared on the Arkansas River in the 1820's, and soon thereafter, Congress considered methods for facilitating commerce on its waters. See H.R. Doc. 227, 22d Cong., 1st Sess. (1832). Congress, recognizing the value of the Arkansas River as both a highway for trade and a means of supplying frontier military outposts (*id.* at 2-3), authorized the War Department to undertake navigational improvements. Act of July 3, 1832, ch. 153, 4 Stat. 551, 553. These improvements consisted primarily of removal of obstructions below Fort Smith, located at the border between the Arkansas Territory and western lands set aside for Indian use—the so-called "Indian Territory." See H.R. Doc. 195, 23d Cong., 2d Sess. (1835). The Army Corps of Engineers, which supervised the work, suggested that further improvements be undertaken, noting (*id.* at 3):

> This river running through the centre of Arkansas and into the Indian territories west of the Mississippi, its safe navigation is of vast importance to the commerce of those countries, and for the transportation

> of stores and munitions of war to the military posts along its banks.

River improvements continued in later years (see S. Exec. Doc. 26, 33d Cong., 1st Sess. (1854)) and Fort Gibson, located within the Indian Territory, became a center of trade (see H.R. Exec. Doc. 295, 41st Cong., 2d Sess. 33 (1870)).

In 1876, the Senate resolved to investigate whether upstream portions of the Arkansas River, as far as Pueblo, Colorado, could be made navigable. S. Misc. Doc. 22, 44th Cong., 1st Sess. (1876). The War Department made a number of attempts to improve the river upstream of Fort Gibson but eventually abandoned the projects. For example, in 1879, the Army Corps of Engineers suggested that various improvements might permit river transportation as far as Wichita, Kansas (H.R. Exec. Doc. 94, 45th Cong., 3d Sess. 8 (1879)), noting that Kansas and, to a lesser extent, the Indian Territory might derive trade benefits (*id.* at 11). Later that year, Congress appropriated $20,000 for limited improvement of the Kansas portion of the river. Act of Mar. 3, 1879, ch. 181, 20 Stat. 363, 366. Additional appropriations followed. Act of July 5, 1884, ch. 229, 23 Stat. 133, 142.

By 1886, however, the Corps had determined that efforts to render the river navigable as far as Wichita were impractical and suggested that, instead, the outer reach of proposed projects be set at Arkansas City, Kansas, located at the border between Kansas and the Indian Territory. H.R. Exec. Doc. 90, 49th Cong., 1st Sess. (1886). The Corps observed that access to river transportation would greatly benefit the farmers of southern Kansas, adding that portions of the Indian Territory are "cultivated to a considerable extent, and the local traffic derived therefrom would be of some importance" (*id.* at 2).

The Corps concluded in 1888 that even improvements as far as Arkansas City were not economically justified and suggested that efforts be concentrated to further improve navigation downstream from Fort Gibson. H.R. Exec. Doc. 234, 50th Cong., 1st Sess. (1888). That year, Congress authorized navigational improvements to the river, but specifically noted that the upstream improvements discussed (and discouraged) by the Corps should not be undertaken. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 415.[2] Congresss, meanwhile, continued to maintain the lower reaches of the Arkansas River through the early part of the twentieth century. See, *e.g.*, Act of Mar. 2, 1907, ch. 2509, 34 Stat. 1073, 1092; Act of June 13, 1902, ch. 1079, 32 Stat. 331, 357.

2. In 1935, Congress requested the War Department to investigate the prospects for a comprehensive project to improve the navigable reaches of the Arkansas River. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1045. In 1945, the Army Corps of Engineers submitted a plan that was to become the McClellan-Kerr Project. H.R. Doc. 758, 79th Cong., 2d Sess. (1946). The Corps recommended that the Arkansas River be developed under a multi-purpose scheme that would yield navigational, flood-control, and hydropower benefits (*id.* at 1-3).

Navigation was the centerpiece of the plan. The Corps would develop and maintain a nine-foot deep, 480-mile channel in the Arkansas River from its mouth at the Mississipi River to Catoosa, Oklahoma. In addition, the Corps would construct a series of locks and canals providing 420 feet of lift between the Mississippi River and

---

[2] A later Corps report suggests that competition from railroads made steamboat transportation less attractive during the era, and led to the declining interest in river development. See H.R. Doc. 758, 79th Cong., 2d Sess. 55 (1946). See also H.R. Exec. Doc. 90, 49th Cong., 1st Sess. 5 (1886) (noting the "strenuous efforts" of the railroads to develop commerce in southern Kansas).

Catoosa (H.R. Doc. 758, *supra*, at 59-66). The Corps envisioned that Oklahoma, Colorado, New Mexico, Kansas, Texas, Missouri, and Arkansas would gain improved access to water transportation, either directly or through connections with highways, pipelines, and rail lines, increasing commerce along the Arkansas River from 600,000 tons per year to more than 9 million tons per year (*id.* at 47-49, 54-55).

Congress approved the McClellan-Kerr Project in 1946. Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636. Construction commenced in 1957, and was essentially complete by 1971.

B. The Present Dispute

The Cherokee Nation of Oklahoma claims that the United States' construction of the McClellan-Kerr Project has resulted in a Fifth Amendment taking of tribal property located within the bed of the Arkansas River. That claim is premised upon the Tribe's recently established title to a portion of the Arkansas River's bed. The Tribe's title rests, in turn, upon nineteenth century treaties and patents.

1. The Cherokee people, together with the Chickasaws, Choctaws, Creeks, and Seminoles, originally inhabited the southern Appalachian region of North America. The United States, through the Treaty of Hopewell (Nov. 28, 1785, 7 Stat. 18), recognized the Cherokees as a distinct tribe possessing limited sovereignty. In the following years, the United States consummated additional treaties with the Cherokees wherein the United States purchased portions of their aboriginal lands and guaranteed their rights to lands not ceded.[3]

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[3] See, *e.g.*, Treaty of Oct. 2, 1798, 7 Stat. 62; Treaty of June 26, 1794, 7 Stat. 43; Treaty of Holston, July 2, 1791, 7 Stat. 39. The United States also attempted to protect Indian occupancy through the

Public demand for Indian displacement eventually led the United States to adopt a policy of western relocation of Indian tribes. See Indian Removal Act of 1830, ch. 148, § 1, 4 Stat. 411-412; Act of Mar. 26, 1804, ch. 38, § 15, 2 Stat. 277, 289. The United States, in turn, entered into a series of treaties with the Cherokees that provided for their resettlement in the Arkansas Territory and beyond. See Treaty of May 6, 1828, 7 Stat. 311; Treaty of Feb. 27, 1819, 7 Stat. 195; Treaty of July 8, 1817, 7 Stat. 156.

The Cherokee relocation was completed through the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, which ceded the Cherokees' aboriginal title to lands east of the Mississippi River in exchange for fee simple title to lands within the Indian Territory. On December 31, 1838, the United States issued a patent confirming the Cherokees' title to a fourteen million acre tract that bordered and partially embraced a portion of the Arkansas River. The Chickasaw and Choctaw Tribes, through similar treaties and patents, received adjacent tracts in the Indian Territory. See Treaty of June 22, 1855, 11 Stat. 611; Treaty of Jan. 17, 1837, 11 Stat. 573; Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333.

By the end of the nineteenth century, public sentiment favored assimilation of the Indian tribes. Congress created the Oklahoma Territory from unoccupied lands within the Indian Territory (Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81) and established a commission to reach agreement with the tribes concerning allotment of tribal lands (Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645-646). The Cherokees, Choctaws, and Chickasaws eventually agreed to allot their lands and terminate tribal affairs. See Act of

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passage of Trade and Intercourse Acts, which restricted the power of non-federal entities to deal with Indian tribes. See Act of July 22, 1790, ch. 33, §§ 1-5, 1 Stat. 137-138; see also *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 668 n.4 (1974).

July 1, 1902, ch. 1375, §§ 11, 63, 32 Stat. 716, 717, 725; Act of June 28, 1898, ch. 517, § 11, 30 Stat. 495, 497-498. Congress thereafter provided for the disposition of Indian land, subject to the condition that any remaining property would "be held in trust by the United States for the use and benefit of the Indians." Act of Apr. 26, 1906, ch. 1876, § 27, 34 Stat. 148. Two months later, Congress created the State of Oklahoma from the Oklahoma and Indian Territories. Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267. It was generally assumed that the State of Oklahoma, upon statehood, received title under the Equal Footing Doctrine to the bed of all navigable portions of the Arkansas River. See, *e.g, Lynch* v. *Clements*, 263 P.2d 153 (Okla. 1953).

2. In 1966, the Cherokee, Chickasaw, and Choctaw Tribes initiated a lawsuit to establish Indian ownership of an 87-mile portion of the riverbed from the confluence of the Arkansas and Grand Rivers to the Arkansas-Oklahoma border. The Cherokee Nation specifically asserted that the Treaty of New Echota and the 1838 patent granting the Tribe fee simple title to lands within the Indian Territory gave the Tribe ownership of the riverbed. The Tribe further asserted that, while most of the Indian lands were later allotted and passed to non-Indian control, the riverbed remained under tribal ownership, held in trust by the United States.

The dispute between the Tribes and the State of Oklahoma eventually reached this Court, where the United States participated as amicus curiae supporting the Tribes' claim of ownership. The Court ruled that the nineteenth century treaties and patents did grant the Tribes fee simple title to the disputed portions of the riverbed. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). The Tenth Circuit concluded on remand that the Tribes hold present title as against the State of Oklahoma (461 F.2d 674, 678, cert. denied, 409 U.S. 1039 (1972)) and later

affirmed a trial court judgment awarding the tribes $786,541.67, based upon an accounting of the revenues derived by Oklahoma from riverbed mineral leases (490 F.2d 521, 523-524, cert. denied, 417 U.S. 946 (1974)).[4]

Following this Court's decision in *Choctaw Nation*, Congress appropriated funds to the Department of the Interior to appraise the riverbed for the purpose of assisting the Tribes in managing the property.[5] Interior, in turn, commissioned independent appraisers to conduct a valuation. The appraisal, completed in 1976, estimated the aggregate value of the Indian interests, including the value attributable to land rentals, minerals, recreation, dam sites and hydroelectric power generation, at $177 million.[6]

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[4] A special three-judge panel later determined a title dispute among the tribes concerning ownership of the riverbed. See *Choctaw Nation* v. *Cherokee Nation,* 393 F. Supp. 224, 246 (E.D. Okla. 1975). Under that decision, the Cherokee Nation holds title to the entire riverbed from the Arkansas River's confluence with the Grand River to its confluence with the Canadian River (a distance of approximately 37 miles) and to the northern half of the bed from the Canadian River to the Arkansas-Oklahoma border (a distance of approximately 50 miles).

[5] These appropriations, which totaled more than $1.2 million, were intended to "enable the tribes to make technical decisions and enter into real estate management agreements." *Department of the Interior and Related Agencies Appropriations for 1973: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 92d Cong., 2d Sess. Pt. 2, at 171 (1972) (Bureau of Indian Affairs Budget Justification).

[6] See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations, Hearings on S. 660 Before the Senate Select Committee on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977) [hereinafter cited as *S. 660 Hearings*]. The Tribe, through further government funding, later contracted for the preparation of an additional appraisal estimating the fair royalty value of the riverbed. See 1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984). We have previously lodged a copy of volume 1 of that appraisal, which sets forth the relevant figures,with the Clerk of the Court (see U.S. Reply Memo. 3 n.2).

The Tribes, relying on the 1976 appraisal, sought to lease their riverbed property to the United States. Officials within the Department of the Interior initially supported legislation that would have authorized the Department to negotiate a lease agreement. See S. 660, 95th Cong., 1st Sess. (1977). However, the Interior Department later withdrew its support and the legislation was not enacted.[7] The Cherokee Nation then requested that the United States pay $8.5 million as compensation for instream damage to sand and gravel deposits allegedly washed away by the construction of the McClellan-Kerr Project. The Department of the Interior and the Army Corps of Engineers, relying on the United States' navigational servitude, ultimately concluded that the claim lacked legal merit, and Congress refused to fund the claim.[8]

In 1981, the Oklahoma congressional delegation introduced a bill to permit the Cherokee Nation to litigate its claim for compensation. The bill conferred jurisdiction on the United States District Court for the Eastern District

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[7] See *S. 660 Hearings* 18-22. The Interior Department witness explained the government's opposition to the legislation as follows (*id.* at 22):

> While, under the doctrine of navigational servitude, there is no precedent which obligates the Federal Government to pay damages, the Secretary can and will review the resources owned by the tribes without legislative direction. Upon completion of that review, we will submit to Congress our recommendations as to the appropriateness of any acquisition or compensation, or assistance to the tribes for leasing the minerals to third parties.

The Department of the Army also opposed the legislation, noting that the government "does not compensate private owners, or the State which owns the riverbed, where such lands are subject to the navigational servitude" (*id.* at 240).

[8] See *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 96th Cong., 1st Sess. Pt. 6, at 899-909 (1979); *id.* Pt. 7, at 379-392.

of Oklahoma to determine, under the jurisdictional provisions of Section 2 of the Indian Claims Commission Act of 1946 (ch. 959, 60 Stat. 1050), "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from the construction of the [McClellan-Kerr Project]." H.R. 2329, 97th Cong., 1st Sess. (1981).[9] The bill was later amended to make clear that the Chickasaw and Choctaw Tribes could bring similar suits (H.R. Rep. 97-453, 97th Cong., 2d Sess. Pt. 1 (1982)). Congress enacted the bill (Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944), thus precipitating the present litigation.

3. The Cherokee Nation filed a complaint (J.A. 6-16) in May 1983, stating two causes of action under Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049). The Tribe contended, first, that the construction of the McClellan-Kerr Project resulted in a Fifth Amendment taking of the Tribe's riverbed interests without just compensation; and second, that even if the United States' actions did not amount to a taking, the failure to pay com-

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[9] See generally *Cherokee Nation of Oklahoma: Hearings on H.R. 2329 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 3 (1981) [hereinafter cited as *H.R. 2329 Hearings*). Section 2 of the Indian Claims Commission Act permits the Indian tribes to adjudicate legal and equitable claims against the United States as well as claims based upon the the government's failure to engage in "fair and honorable dealings" (60 Stat. 1050). See note 10, *infra*. The bill waived the five-year limitation on actions set forth in Section 12 of the Indian Claims Commission Act (60 Stat. 1052) and the six-year limitation in 28 U.S.C. 2401 and 2501. The Department of Justice, adhering to its policy against special waivers of limitation statutes, opposed the legislation. It noted that the Cherokee Nation had received more than $16 million through previous claims under the Indian Claims Commission Act and similar statutes (*H.R. 2329 Hearings* 27-28). The Department of Justice also expressed its view that the United States' navigational servitude would preclude government liability (*id.* at 56-57).

pensation violated the government's duty to engage in "fair and honorable dealings" with the Tribe (J.A. 11-14).[10] The Tribe demanded compensation, based on fair market value, for occupation of tribal lands (including the value of electrical energy generated at the dam sites), and for past and future loss of sand, gravel and coal (*id.* at 14-16). The United States responded, among other defenses, that the government's navigational servitude precludes liability for the alleged taking and that the exercise of the navigational servitude did not constitute a failure to observe fair and honorable dealings with the Tribe (*id.* at 17-18). Pursuant to the parties' suggestion, the court considered these two questions of law through cross-motions for summary judgment.

The district court granted partial summary judgment in favor of the Tribe (Pet. App. 25a-28a). The court held that this Court's ruling in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging to the Cherokee Nation" (*id.* at 26a). The court further held that the United States, having failed to reserve a navigable servitude in its treaty with a sovereign Indian nation, owed the Tribe just compensation (*id.* at 27a). The court did not address the fair and honorable dealings claim (*id.* at 28a). The court concluded, sua sponte, that its decision "in-

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[10] Section 2 of the Indian Claims Commission Act permits an Indian tribe to sue the United States based on (60 Stat. 1050):

> (1) claims in law or equity arising under the Constitution, laws or treaties of the United States * * *;
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> * * * * *
>
> (4) claims arising from the taking by the United States * * * of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;
>
> (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

volves a controlling question of law as to which there is substantial ground for difference of opinion" (*id.* at 28a) and therefore certified the case, pursuant to 28 U.S.C. (& Supp. II) 1292(b), for interlocutory appeal.

The court of appeals granted the government's petition for interlocutory review (Pet. App. 24a). A divided panel ultimately affirmed the district court's decision, but adopted a different analysis (*id.* at 23a). The court rejected the district court's conclusion that "the failure of the United States to reserve a navigational easement in the treaty grant" operated to defeat its constitutional power under the Commerce Clause, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (*id.* at 9a). The court nevertheless concluded that the navigational servitude did not protect the United States from liability.

The court stated that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large" (Pet. App. 10a (emphasis in original)). The court further stated that the scope of the government's navigational servitude therefore depends on whether the navigational improvements interfere with property rights connected to private navigational uses or with property rights connected with other types of uses (*ibid.*). The court concluded—without citing any precedential support—that "[w]hen the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due" (*ibid.*).

The court then recited a number of factors that, it concluded, make this case "unique" (Pet. App. 11a). It noted that the Cherokee Nation holds fee simple title to the riverbed (*id.* at 10a), that the Tribe's property interests are secured by treaty (*id.* at 12a), and that the government has a trust relationship with the Tribe (*id.* at 13a). The court

also accepted the Cherokee Nation's contention that the Tribe's ownership of a portion of the Arkansas River's bed "makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a) and that "this status has not been lost simply because the Tribe has not excluded navigation" (*ibid.*). It summarized its decision as follows (*id.* at 16a):

> The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value.

The court then remanded the case for a determination of damages under the taking claim and "whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact" (*ibid.*).

Judge Seth dissented (App., *infra*, 17a-23a). He reasoned that the nature and source of the Tribe's title to the riverbed make no difference in determining the scope of the government's navigational servitude (*id.* at 18a). He also observed that "navigable rivers are 'public property' and have been since the earliest time" (*id.* at 19a). Judge Seth surveyed the numerous decisions of this Court holding that instream and riparian property rights are held subject to the federal government's dominant power to improve navigable waters (*id.* at 19a-22a). He concluded that the "exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject" (*id.* at 22a). He also explained that the Tribe's treaty rights do not "increase the extent or nature of the Cherokee's title" to create a " 'fee plus' " (*id.* at 23a), observing that there is no authority for treating a naturally navigable waterway as a "private river" or for "creat[ing] an exception to the application of the naviga-

tional servitude because plaintiff is an Indian tribe" (*ibid.*). Finally, Judge Seth rejected the notion that the Cherokee Nation could enlarge its property rights by invoking the United States' trust obligations to the Tribe (*ibid.*).

SUMMARY OF ARGUMENT

The United States' construction of the McClellan-Kerr Project has not resulted in a compensable taking of the Cherokee Nation's property interests. The United States' established power to improve navigation free from claims for compensation—its so-called "navigational servitude"—precludes the Tribal's claims for compensation in this case.

A. The Commerce Clause broadly empowers Congress to improve navigable waters for the public benefit. This Court, construing that authority in light of history and the needs of interstate commerce, has developed the concept of a federal navigational servitude. The concept expresses a firm rule: the United States is not required to pay compensation for damage to instream property resulting from federal navigation improvements. That rule is deeply rooted in Anglo-American law. It has enabled Congress to promote commerce along the nation's great waterways, encouraging the settlement, economic growth, and commercial unification of the country. The navigational servitude thus provides substantial benefits to both riparian and nonriparian interests, upstream and downstream, of all components of the United States, including Indian tribes. This Court, applying the navigational servitude in a wide range of situations, has never deviated from the principle that the United States owes no compensation when the government's navigational improvements impair private instream interests in navigable waters.

B. The Cherokee Nation, like any other owner of in-stream or riparian property rights, is subject to the navigational servitude. This Court has recognized that Indian tribes are subject to the servitude on two separate occasions, in *Montana* v. *United States*, 450 U.S. 544, 555 (1981), involving a title dispute between Montana and the Crow Tribe, and in *Choctaw Nation* v. *United States*, 397 U.S. 620 (1970), the very case that established the Cherokee Nation's property rights in the Arkansas River. That result would be clearly mandated, even in the absence of those decisions. This Court has repeatedly indicated that the servitude applies to *all* holders of riparian and riverbed interests.

The Cherokee Nation's sovereign status certainly provides no basis for exempting the Tribe from the navigational servitude. The states, which possess the full measure of sovereignty permitted by the Constitution, are subject to the servitude. Likewise, the Cherokee Nation is not entitled to an exception on the ground that it received its title to the Arkansas River's bed through a treaty and patent. The United States is not obligated to reserve its constitutional powers through express language in its agreements with the Indian tribes. And the Cherokee Nation's fee simple ownership provides no basis for an exemption. This Court has established that the navigational servitude applies regardless of the character of the property owner's title. Finally, the Cherokee Nation cannot invoke the United States' trust obligations to the Indian tribes as a ground for an exemption. The trust relationship cannot create property rights where none would otherwise exist.

In sum, there is no plausible ground for exempting the Cherokee Tribe from the United States' navigational servitude—and no basis for the court of appeals' novel redefinition of the navigational servitude to accomplish that result. Indeed, that redefinition cannot be reconciled with this Court's holdings applying the servitude.

Moreover, the Cherokee Nation's demand for compensation, if allowed, would amount to a substantial toll on commerce along the Arkansas River. The recognition of this claim would be particularly incongruous because the Cherokee Nation has been among the historic beneficiaries of federal navigation improvements. Furthermore, it would upset settled expectations, encourage litigation over long settled doctrine, and perhaps ultimately discourage the construction and maintenance of navigation projects that benefit the public at large.

ARGUMENT

THE CHEROKEE NATION IS NOT ENTITLED TO COMPENSATION FOR IMPAIRMENT OF INSTREAM TRIBAL PROPERTY RESULTING FROM THE CONSTRUCTION AND OPERATION OF THE McCLELLAN-KERR PROJECT

A. The United States Is Not Obligated to Pay Compensation for Impairment of Instream Property Resulting From the Construction and Operation of Federal Navigation Improvement Projects

The Commerce Clause broadly empowers Congress to improve navigable waters for the public benefit. This Court, construing that authority in light of history and the needs of interstate commerce, has developed a firm rule: the United States is not required to pay compensation for damage to instream property resulting from federal navigation improvements.

1. "The Commerce Clause confers a unique position upon the Government in connection with navigable waters." *United States* v. *Rands*, 389 U.S. 121, 122 (1967). It broadly empowers the government to protect, regulate, and improve navigable waters for commercial use (*id.* at 122-123). "This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below the high water mark." *Rands*, 389 U.S. at 123. The United States, in the exercise of its navigational servitude, may

improve navigable waters free from claims for compensation from persons or entities claiming property interests in the stream or the underlying lands. As this Court has explained (*ibid.*):

> The proper exercise of this power is not an invasion of any private property rights in the stream or in the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

History demonstrates that navigable waters are a unique national resource that provide important public benefits. They are singularly valuable because they provide natural access to inland territories; they are concomitantly imbued with a particular public interest that derives from free public use.[11] As Chief Justice Marshall presciently realized, federal control over "the deep streams which penetrate our country in every direction" (*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1833)) was essential to the commercial unification of the country. The nation's great

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[11] The middle ages witnessed the destructive effect of "private ownership" of navigable waters—the imposition of monopolistic tolls that provided a windfall to the owner at the public's expense. As one historian explained (D. Hay, *Europe in the Fourteenth and Fifteenth Centuries* 361-362 (1966)):

> Rivers were navigated wherever possible * * *. Nevertheless, the disadvantages of rivers were in some ways even greater than roads, for they attracted the predatory lord who imposed tolls on the traffic passing through his territory. * * *. There were tolls on the Seine and the Garrone every six or seven miles. Other continental rivers were sometimes even more heavily oppressed; at the start of the fourteenth century there were thirty-five tolls on the Rhine and this had nearly doubled by 1500. Where monarchy was strong (as in England) this never became an impediment; * * * but in general by the fourteenth century the inland transport of anything but small and precious commodities, or of local goods going relatively short distances, tended to be expensive.

waterways, such as the Mississippi, Missouri, and Arkansas rivers, opened the American frontier to settlement and, even now, serve as vital arteries for the country's economic sustenance and growth.[12]

This Court, attentive to history and the needs of interstate commerce, concluded that navigable waters, in this context, must be recognized as " 'public property of the nation, and subject to all the requisite legislation by Congress.' " *Wyandotte Co.* v. *United States,* 389 U.S. 191, 201 (1967) (citation omitted); *United States* v. *Rands,* 389 U.S. at 123; *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941); *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724-725 (1865). The navigational servitude reflects a considered judgment that the public interest in free navigation imposes a corresponding limitation on rights in riparian and riverbed lands. The Court has applied the navigational servitude broadly in recognition that the public interest in navigation, long acknowledged in Anglo-American law, decisively overrides the assertion of private instream rights. See *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913); see also *Scott* v. *Lattig,* 227 U.S. 229, 242-243 (1913); *Railroad Co.* v. *Schurmeir,* 74 U.S. (7 Wall.) 272, 288 (1868); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 414 (1842).[13]

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[12] "What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518, 577 (1851). It is certainly no coincidence that most of the Nation's major cities are located on navigable waterways.

[13] Congress has recognized this principle as well, stating that "[a]ll navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways" (43 U.S.C. 931). The sovereign's unique interest in protecting the public's interest in navigable waters is deeply rooted in American and English law. See,

2. This Court, applying the navigational servitude doctrine in a wide range of situations, has never deviated from the fundamental constitutional principle that the United States owns no compensation when the government's navigational improvements impair private interests in navigable waters.[14] The doctrine applies with conclusive

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e.g., Act of May 18, 1796, ch. 29, § 9, 1 Stat. 468 ("all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways"); Act of June 1, 1796, ch. 46, § 6, 1 Stat. 491 (accord); Act of Mar. 3, 1803, ch. 27, § 17, 2 Stat. 235 (accord); *Commonwealth* v. *Charlestown,* 18 Mass. (1 Pick.) 180, 184 (1822) ("Those who thus acquired the property of the shore [under a 1641 colonial ordinance] were restricted from such a use of it as would impair the public right of passing over the water * * *."); J. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 28-29 (1826) ("By the common law all arms of the sea, navigable rivers, & c. are considered as public highways * * *.).

[14] *E.g., Rands,* 389 U.S. at 122-124 (loss of a potential port site on riparian lands); *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 231-233 (1960) (loss of upstream hydropower opportunities); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 224-226 (1956) (loss of a hydropower site on riparian lands); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 511 (1945) (loss of upstream hydropower opportunities); *United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390-391 (1945) (damage to a stream bed; loss of riparian access); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941) (damage to an embankment built within navigable waters); *Willink* v. *United States,* 240 U.S. 572, 579-580 (1916) (prohibitions on the rebuilding on a wharf and piling); *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. 251, 268 (1915) (removal of a wharf); *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. 82, 89 (1913) (destruction of oyster beds within a harbor bed); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 71-72 (1913) (loss of hydropower opportunities); *West Chicago Street R.R.* v. *City of Chicago,* 201 U.S. 506, 524-525, 527-528 (1906) (removal of a tunnel beneath the bed of a navigable river); *Scranton* v. *Wheeler,* 179 U.S. 141, 163-165 (1900) (loss of riparian access); *Gibson* v. *United States,* 166 U.S. 269, 271-272 (1897) (loss of riparian ac-

force when the United States' navigational improvements damage property within the bed of a naturally navigable body of water. *E.g., United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390 (1945); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. at 596-597. This Court, more than 70 years ago, unequivocally confirmed that the United States owes no compensation even if its navigational improvements completely destroy such property. *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. 82 (1913).

In *Lewis,* the plaintiff cultivated oysters on leased lands beneath Great South Bay, New York. The United States dredged the bay to improve navigation, destroying the plaintiff's oyster beds. This Court rejected the plaintiff's demand for just compensation, stating (229 U.S. at 88):

> By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

The Court relied in part (*id.* at 88-89) on its prior decision in *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900), adding:

> The whole subject of the nature and character of the interest of the owner of such a title and the scope of the control of the Congress over navigable rivers has been fully considered by this court in *United*

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cess); See also *South Carolina* v. *Georgia,* 93 U.S. 4, 10-12 (1876) (refusing to enjoin federal navigational improvements that diminished stream flows in the Savannah River).

> *States* v. *Chandler-Dunbar Water Power Co.*, [229 U.S. 53 (1913)], where the decision in *Scranton* v. *Wheeler* was fully affirmed.

See also, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-176 (1979) (quoting *Chandler-Dunbar* and *Scranton* with approval); *Rands*, 389 U.S. at 123-124.

The navigational servitude does not, of course, "create a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Kaiser Aetna*, 444 U.S. at 172. "The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid." *Rands*, 389 U.S. at 123.[15] Similarly, when the government opens a private pond—made navigable through private efforts—to public use against the wishes of its owner, this Court has concluded that just compensation is due. *Kaiser Aetna*, 444 U.S. at 178-180. But the rule has been decisively settled—through " 'battles long ago' " (*id.* at 177)—that the United States is not constitutionally obligated to pay compensation when the construction or operation of a federal navigational improvement project impairs property within the bed of a naturally navigable river.

B. The Cherokee Nation is Subject to the Established Rules Governing Federal Navigational Improvements

The Cherokee Nation seeks compensation for impairment of instream property interests resulting from the McClellan-Kerr Project, a federal navigation improve-

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[15] Notably, however, the United States bears no constitutional obligation to compensate the owner of fast lands for value attributable to riparian location. See *Rands*, 389 U.S. at 123-125. Congress has authorized such compensation as a matter of legislative grace. 33 U.S.C. 595(a).

ment plan. As previously demonstrated—and as the Tribe seemingly admits (Br. in Opp. 11-12)—this claim, if raised by any other owner of such interests, would surely be rejected. There is no reason to create a special exception for the Cherokee Nation—and much reason not to do so. The Cherokee Nation, like any other owner of instream or riparian property interests, is subject to the United States' navigational servitude.

1. This Court has already recognized that Indian tribes are subject to the United States' power under the Commerce Clause to regulate and improve navigation. See *Montana* v. *United States,* 450 U.S. 544, 555 (1981). The Court, in determining whether the State of Montana or the Crow Tribe owned title to the bed of the Big Horn River, stated (*ibid.*):

> As the Court of Appeals recognized [*United States* v. *Finch,* 548 F.2d 822, 834 n.25 (9th Cir. 1976)] and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who [Montana or the Crow Tribe] owns the riverbed.

Indeed, this Court had previously expressed the same principle in *Choctaw Nation* v. *Oklahoma, supra,* the very case that established the Cherokee Nation's instream property rights in the Arkansas River.

In *Choctaw Nation,* the Court was sharply divided on the question whether the Indian Tribes or the State of Oklahoma owned the bed of the Arkansas River. However, the Court was in full agreement that the United States retained its navigational servitude no matter who held title to the riverbed. The majority opinion cited the existence of the navigational servitude as support for its

conclusion that the United States intended to convey title to the Indian Tribes. The Court explained (397 U.S. at 635):

> Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce.

The dissenting opinion agreed that the navigational servitude could not have been extinguished, stating (397 U.S. at 652-653 (White, J., dissenting)):

> No one suggests that the Cherokees were granted full sovereignty over the Arkansas River, that the United States had conveyed away its power to control navigation and commerce on the Arkansas, or that the public had lost its right to travel the navigable portion of the Arkansas by virtue of the conveyance to the Cherokee Nation.

These statements were in no sense inadvertent. The navigational servitude figured prominently in the briefing and argument of *Choctaw Nation.* The Indian tribes, throughout that case, repeatedly maintained that their riverbed interests are subject to the United States' navigational servitude. The Cherokee Nation, in its opening brief, stated that "there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore* v. *United States,* 157 F.2d 760 (9th Cir. 1946)." Cherokee Nation Br. 19. See also Choctaw and Chickasaw Nations Br. 48-49; United States Br. 24. The Tribe forcefully reiterated this point in its reply brief, specifically stating (Cherokee Reply Br. 13-14):

> Throughout their brief respondents imply that if title to the river were vested in the [Tribe] and not in the state (under the equal footing-implied trust doctrine) the authority and power of the United States could somehow be compromised. Such an inference is ab-

> surd; no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same.

The Tribes repeated this point at oral argument, stating (Tr. Oral Arg. 14-15 (Oct. 22, 1969)):

> So all the United States did, and the United States did that in its treaties with the Indians, and we point that out in our brief, that they reserved a navigation easement. They have always exercised it. They exercised it long after the Indians moved to Oklahoma.

The United States, participating as amicus curiae in support of the Tribes, agreed that the federal government retained its navigational servitude. It stressed that point in both the original argument (*id.* at 4-5 (Oct. 23, 1969)) and on reargument several months later (*id.* at 25, 29 (Mar. 5, 1970)).

Thus, the Court's observation in *Choctaw Nation* that the United States retained its navigational servitude was made in response to the clearly articulated—and correct—arguments of the United States and the Indian tribes.

2. Indeed, it would be entirely clear, even in the absence of this Court's decisions in *Montana* and *Choctaw Nation,* that the United States' navigational servitude precludes the Cherokee Nation's claim for compensation. This Court has repeatedly indicated that the navigational servitude applies without exception to *all* holders of riparian and riverbed interests. "When the United States appropriates the flow either of a navigable or a non-navigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 233 (1960). There is no reasonable basis for excepting the Tribe from the United States' Commerce Clause powers.

The court of appeals concluded otherwise, stating—without any precedential support—that (Pet. App. 10a):

> When the exercise of [the navigational servitude] affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

This is a novel and serious misstatement of the law, at least with respect to interests within the bed of a navigable river.[16] This Court has never held that the scope of the United States' servitude depends on the private owner's use of the submerged lands. To the contrary, the Court has consistently and categorically denied compensation for instream damage resulting from a federal navigation project, regardless of the private property owner's instream use.[17] The governing rule in the instant case is plain and

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[16] The court of appeals' ruling apparently originates in a misreading of cases dealing with compensation for navigational improvements that impair property *above* the high water mark. See Pet. App. 10a. The general rule, set forth in *Rands,* states that an owner is entitled to compensation for the taking of fast lands, but value attributable to riparian location, such as power site or port site value, is noncompensable absent a specific statutory allowance. 389 U.S. at 123-125. That rule has no application to this case since the Tribe owns only the stream bed.

[17] For example this Court has held—without any balancing of interests—that no compensation is due when the government's navigational improvements result in instream damage to railroad embankments (*United States* v. *Chicago, St. P. & P. R.R.,* 312 U.S. at 599) or the destruction of oyster beds (*Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. at 87-89), when they require the removal of bridges placed within navigable waters (*Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 421 (1917); *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400-401 (1907)) or tunnels dug beneath the bed (*West Chicago Street R.R.* v. *City of Chicago,* 201 U.S. 506 (1906)), and when they prevent the use of stream flow for hydropower

firmly established: the government owes no compensation when navigational improvements impair or destroy property located within the bed of a naturally navigable body of water. The court's use of an ad hoc balancing test—the same generic test used in a general takings analysis—ignores a century of contrary precedent. It reduces the United States' navigational servitude to no more than a mere right to ply navigable waters. As we shall now show, neither the court nor the Cherokee Nation has identified any plausible basis for departing from the established application of the navigational servitude.

a. The Cherokee Nation's sovereign attributes plainly provide no ground for exempting the Tribe from the traditional reach of the navigational servitude. The United States exercises expansive authority over navigable waters specifically to ensure that, notwithstanding the nation's constituent sovereigns, interstate trade will be conducted in a unified national economy (see pages 17-19). The states, which possess the full measure of sovereignty allowable under the Constitution (U.S. Const. Amend X), are subject to the servitude.[18] Indian tribes, which possess only "quasi-sovereign" status at the sufferance of Congress,[19] and which have been divested of elements of

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development activities (*United States* v. *Grand River Dam Authority*, 363 U.S. at 231; *United States* v. *Twin City Power Co.*, 350 U.S. at 225-226; *United States* v. *Willow River Power Co.*, 324 U.S. at 509; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 72).

[18] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (" 'although the title to the shore and submerged soil is in the various States and individual owners under them, it is aways subject to the servitude * * *' ") (quoting *Gibson* v. *United States*, 166 U.S. 269, 271 (1897)); see also, *e.g.*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 423 (1940); *United States* v. *Oregon*, 295 U.S. 1, 14 (1935); *United States* v. *Holt State Bank*, 270 U.S. 49, 54 (1926); *New Jersey* v. *Sargent*, 269 U.S. 328, 337 (1926).

[19] *Montana* v. *United States*, 450 U.S. at 563-564; *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 207-210 (1978).

sovereignty " 'inconsistent with the overriding interests of the National Government,' " [20] must likewise be subject to this Commerce Clause restraint. See U.S. Const. Art. I, § 8.

b. Likewise, the Cherokee Nation is not entitled to an exception on the ground that it received its title through a treaty with, and patent from, the United States. The Cherokee Nation, like any owner of lands beneath navigable waters, took its riverbed interest subject tc the federal government's dominant power under the Commerce Clause to regulate and promote navigation. The United States was not obligated to make an express reservation of that power in the treaty or patent. The retention of sovereign authority is implicit in government agreements " 'unless surrendered in unmistakable terms.' " *Bowen* v. *Public Agencies Opposed to Social Security Entrapment,* No. 85-521 (June 19, 1986), slip op. 10-11 (quoting *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982)).[21] This principle holds true in the case of Indian treaties. For example, this Court recognized long ago that Cherokee lands are subject to the government's power of eminent domain, stating:

> It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of ~~which~~ which were wards of the United States, and directly subject to its political control.

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[20] *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 332 (1983) (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153 (1980)).

[21] See also *City of El Paso* v. *Simmons,* 379 U.S. 497, 508-509 (1965); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 434-435 (1934); *Gajewski* v. *United States,* 327 F.2d 239, 241 (8th Cir. 1964).

Cherokee Nation v. *Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890).[22] The Cherokee Nation is not entitled to a special exemption from the servitude simply because it acquired its property rights by nineteenth century treaty. Even persons who hold property rights that predate the formation of the Union—including title to submerged lands within the original thirteen colonies—are subject to the navigational servitude. See *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. at 86; cf. *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876).[23]

c. Furthermore, the Cherokee Nation cannot claim an exemption from the servitude on the ground that it holds fee simple title to submerged lands. There is nothing unusual, with respect to the navigational servitude, about fee simple ownership of riverbed interests.[24] This Court has long held that "although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in

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[22] See also FPC v. *Tuscarora Indian Nation*, 362 U.S. 99, 120-123 (1960); *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 484 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27 (1886); *Mackey* v. *Coxe*, 59 U.S. (18 How.) 100, 103 (1855); 6 Op. Att'y Gen. 302, 308 (1854); 2 Op. Att'y Gen. 693 (1834); 2 Op. Att'y Gen. 402 (1830).

[23] Notably, in *Lewis*, the plaintiff cultivated oysters on leased lands that were originally conveyed by royal patent from Great Britain during the colonial period. 229 U.S. at 86, aff'g; 198 N.Y. 287, 288 (1910). The United States' navigational servitude nevertheless applied (see page 21, *supra*).

[24] The states, under the Equal Footing Doctrine, generally acquire fee simple title to lands beneath navigable waters upon their entry into the Union. See, *e.g.*, *Montana* v. *United States*, 450 U.S. at 551. And private parties may hold fee simple title to lands beneath navigable waters through grants from the federal and state governments (see, *e.g.*, *id.* at 551-552) or by principles of state property law (see, *e.g.*, *United States* v. *Commodore Park*, 324 U.S. at 390; *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. at 596; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 60-61).

respect of navigation created in favor of the Federal government by the Constitution." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (quoting *Gibson* v. *United States*, 166 U.S. at 272). The Court, in *West Chicago Street R.R.* v. *City of Chicago*, 201 U.S. 506 (1906), specifically rejected any distinctions based on the quality of the property owners' title. In that case, a railroad had placed a tunnel beneath the bed of a navigable river. The Court required the railroad to remove the tunnel—at the railroad's expense—to permit navigational improvements, stating (*id.* at 520):

> Great stress is placed by the railroad company on the fact that is it the owner in fee of the bed of the river at the point where the tunnel was constructed. But that fact is not vital in the present discussion; for it was adjudged by the state court—in harmony with settled doctrines, as will presently appear—that * * * "in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as consistent with the public right * * *" [quoting 214 Ill. 9, 20].

There is no reason why the Cherokee Nation's title should be treated differently.

d. Finally, the Cherokee Nation cannot invoke the United States' trust obligations to the Tribe as a basis for an exemption. The Tribe's right to compensation depends on constitutional principles defining the Cherokee Nation's property rights in the underlying riverbed. A trust relationship does not expand those rights. It may create an obligation to administer or protect property rights already in existence (see, *e.g.*, Restatement (Second) of Trusts § 2 (1959)), but it cannot create property rights where none would otherwise exist. The crucial inquiry in the present case is whether the Tribe's ownership of the bed of the Arkansas River establishes a right to compensation for alleged damage resulting from the McClellan-Kerr Project.

As the preceding discussion demonstrates, the Cherokee Nation has no greater property right in submerged lands than a state, a private individual, or other non-federal entity. The Tribe's invocation of trust principles does not alter that fundamental fact.[25]

3. The foregoing discussion demonstrates that there is no plausible ground for exempting the Cherokee Nation from the established rule that the United States need not pay compensation when federal navigational improve-

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[25] Indeed, the cases cited by the court of appeals and the Cherokee Nation—*United States* v. *Sioux Nation*, 448 U.S. 371 (1980), and *United States* v. *Creek Nation*, 295 U.S. 103 (1935)—illustrate that trust principles are not relevant to the present controversy. In those cases, the United States defended specific transactions with the Indian tribes on the theory (originating in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903)) that the United States cannot be held liable for actions taken in the exercise of its trust power to manage and control tribal affairs. See *Sioux Nation*, 448 U.S. at 409-410; *Creek Nation*, 295 U.S. at 109-110. This Court rejected the United States' position under the facts of these cases, concluding that the United States remained liable to the Tribes under traditional legal standards, *notwithstanding* its special trust powers. The Court stated (*Sioux Nation*, 448 U.S. at 415 (quoting *Creek Nation*, 295 U.S. at 109-110)):

> In every case where a taking of treaty protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in * * * a guardian [relationship] and to pertinent constitutional restrictions."

Sioux Nation and *Creek Nation* establish that the United States cannot invoke its trust powers to excuse the federal government's noncompliance with constitutional requirements. But those cases do not support the Cherokee Nation's quite different contention that the trust relationship somehow alters the applicable constitutional standards or creates property rights where none would otherwise exist. See *Sioux Nation*, 448 U.S. at 409 n.26.

ments impair instream property. Indeed, the requested exemption would be inconsistent with the basic objectives of that rule.

The navigational servitude, a concept deeply rooted in history (pages 18-19, *supra*), enables Congress to promote commerce along the nation's great waterways. Absent the servitude, navigational improvements benefiting the entire nation could be held hostage by the claims of individual stream bed owners to "just compensation." These owners, like the feudal lords of the middle ages, would exact their tolls on the general public, burdening interstate transportation and ultimately impeding the free flow of the nation's commerce.

The Cherokee Nation's claim illustrates the magnitude of that threat. The Tribe contends that the McClellan-Kerr Project, vital to the commerce of the Southern Plains states, has impaired its partial ownership interest in an 87-mile stretch of the Arkansas River. If the Tribe is permitted to proceed on this claim, it presumably will demand royalties of $60 million for the past use of its portion of the riverbed (Br. in Opp. 7 n.15); the two other tribes holding title to portions of that stretch of the riverbed—the Choctaw and Chickasaw Nations—will likely present additional claims for past royalties in the amount of $48 million (*ibid.*). The Cherokee Nation's appraisal further states that the Cherokee, Choctaw, and Chickasaw Nations are collectively entitled to *future royalties* in the amount of $140 million *every 25 years* (1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984)).

The Cherokee Nation's claim is also somewhat ironic in light of the history of navigational improvements on the Arkansas River. As we have previously explained, the United States initiated navigational improvements on the Arkansas River prior to the Treaty of New Echota (see pages 3-4, *supra*). These navigational improvements brought trade and commerce to the Indian Territory that

doubtlessly benefited the Tribe.[26] Indeed, the navigational projects—which required the expenditure of public funds and, perhaps, burdened downstream landowners—were often justified, in part, as promoting commerce within the Indian Territory (see pages 3-4, *supra*). The Cherokee Nation, having enjoyed direct benefits from river improvement projects that depended upon the United States' exercise of its navigational powers, now seeks to tax the development of similar opportunities for upstream interests and those who wish to trade with them.[27]

This irony further illustrates the rationale of the servitude's firm rule precluding claims for just compensation based on instream damage from federal navigation im-

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[26] The Army Corps of Engineers described the Arkansas River trade as follows (H.R. Exec. Doc. 295, *supra,* at 33):

> Twenty steamboats, averaging three hundred tons burdens, now ply between Fort Gibson, Fort Smith, Little Rock, and New Orleans, Memphis, St. Louis, and Cincinnati. Seven boats are engaged in the White River trade. The amount of up and down river trade, received and shipped at Fort Gibson, Indian Territory, is about 25,000 tons annually, exclusive of government freight. It consists of robes, hides, and furs, shipped from Fort Gibson, and merchandise brought from New York, Philadelphia, Cincinnati, St. Louis, and New Orleans.
>
> The government freight received at the same point amounts to about $5,000,000 annually. It consists of dry-goods, groceries, hardware, machinery, and sutlers' stores. This includes all merchandise to be forwarded to the Creek and Seminole agencies, North Fork, Ocmulgee, and to trading posts generally throughout the interior, which are too far distant from Fort Smith to make it profitable to haul goods overland from this point.

[27] Indeed, the Tribe maintains, despite all history to the contrary, that the Arkansas River is a "private waterway" (see Pet. App. 15a; 26a). That contention is, of course, meritless. Navigable waters are " '[incapable] of private ownership' " (*Kaiser Aetna,* 444 U.S. at 179 (quoting *Chandler-Dunbar Co.,* 229 U.S. at 69)).

provement projects. Navigational improvements provide direct or indirect benefits for the entire public, whether upstream or downstream, riparian or non-riparian, Indian or non-Indian. The traditional constitutional rule, precluding all claims based on compensation for instream damage, should apply correspondingly to the entire public as well. If there are cases of special hardship or loss, Congress—the branch of government charged with the appropriations power (U.S. Const. Art. I, § 9, Cl. 7)—can provide the appropriate remedy. See *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("Such losses may be compensated by legislative authority, not by force of the Constitution alone.").[28]

Congress, thus far, has declined to authorize special payment to the Cherokee Nation for damage to its instream interests, despite the Tribe's specific and repeated requests (see page 10, *supra*). Instead, Congress has permitted the Tribe to seek a judicial remedy (to the extent one is available) based on traditional legal doctrines governing such disputes.[29] Even if its judicial claims are rejected, the Cherokee Nation may return to Congress for relief.

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[28] Congress, on several occasions, has provided compensation where the navigational servitude would otherwise preclude government liability. For example, Congress has permitted compensation for the occupation of fast lands beyond what this Court's decision in *Rands* would allow. See 33 U.S.C. 595(a) (providing that fast lands taken for navigational purposes shall be valued "based upon all the uses to which such property may reasonably be put"). And Congress has permitted oystermen to seek damages for destruction of oyster beds cultivated on private lands, notwithstanding this Court's decision in *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs, supra.* See 28 U.S.C. 1497.

[29] In addition to its claim for just compensation, the Tribe has sought damages based on Section 2(5) of the Indian Claims Commission Act, which permits claims based on the government's failure to

Under these circumstances, there are simply no grounds for distorting the established contours of the navigational servitude. A departure from the established rule would upset settled expectations and encourage litigation over long settled doctrine. It might ultimately lead to windfalls for instream property owners at the public expense and discourage the construction and maintenance of navigation projects that benefit the public at large.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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engage in "fair and honorable dealings" with Indian tribes. See note 10, *supra*. We urged the district court to reject that claim. As we explained below, the government does not engage in unfair or dishonorable dealings by refusing to pay an Indian tribe for impairment of noncompensable interests or by exercising valid constitutional powers that advance the general public interest. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 128 (1983). The district court did not rule on this issue.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

THE CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CHEROKEE NATION

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QUESTION PRESENTED

Whether the United States, under the unique and special circumstances present in this case, can appropriate riverbed lands within that portion of the navigable Arkansas River flowing through the Cherokee domain in Oklahoma—solemnly guaranteed to the Cherokee Nation in treaties forever, and evidenced by solemn grant by the United States thereunder to it in fee simple; and held by the United States in trust for the use and benefit of said Indian Nation—and thus violate its trust obligations by exercising its navigational easement and divesting said vested tribal assets, and using said trust property for its own public purposes, without rendering, or assuming an obligation to render, just compensation to the Indian nation therefor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1940

UNITED STATES OF AMERICA,
Petitioner,

v.

THE CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CHEROKEE NATION

STATEMENT

1. Proceedings Below

The Cherokee Nation filed its Complaint on May 23, 1983, alleging that the construction of the McClellan-Kerr Navigation System had created a loss of its tribal assets in the Arkansas riverbed, held in trust by the United States for said nation of Indians, and constituted a taking of said assets by the United States under the Fifth Amendment to the Constitution of the United States. The United States answered that it had a navigational easement in the Arkansas River within the Cherokee domain, in the exercise of which no taking occurred.

The Court framed the following issues:

> 1. Whether the United States' navigational servitude in the Arkansas River prevents liability for an alleged fifth amendment taking of land held in fee by the Cherokee Nation?
>
> 2. Whether the exercise of a navigational servitude constituted the breach of some duty of care to plaintiff?

Pet. for Cert., App. C 25a.

Upon review of the briefs of the parties, the district court held that by treaty and patent the United States granted to the Cherokee Nation the full fee simple title, without a reservation of a navigational servitude in that part of the Arkansas River located within the Cherokee Nation; and that the Cherokee Nation had a vested property right in said riverbed, which was divested by action of the United States, for which just compensation must be paid the Cherokee Nation.

The district court decided the case under the first issue, and did not address the second issue, which is within the class of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity". Section 2, Clause 5 of the Indian Claims Commission Act. *Otoe and Missouria Tribe v. United States*, 131 Ct.Cl. 593, 131 F.Supp 265 (1955), cert. den., 350 U.S. 848. The court found in favor of the Cherokees, certifying the case for interlocutory review. Pet. for Cert., App. C, 25a.

On appeal the circuit court affirmed, but on different grounds. The appeals court did not agree that the United States needed to have reserved its servitude in the patent. It was held this did not affect the fact that the Cherokees did have compensable property interests in the bed of the river. It was further held that just compensation must be paid for a taking of those interests.

The Cherokee Nation does not waive its right to have a determination of the case under Section 2, Clause 5 and should this Court disagree with the court of appeals decision under the first issue, it prays remand to the district court for a determination under Section 2, Clause 5 of the Indian Claims Commission Act, August 13, 1946, Ch. 949, 60 Stat. 1049, 1050.

2. Nature of the Case

By direct grant from the United States the Cherokee Nation received the full fee simple title to its domain in Indian Territory, now a part of the State of Oklahoma, including a portion of the Arkansas riverbed, a navigable stream located within the grant. The treaties and patent evidencing the grant, gave the Cherokee Nation fee simple absolute title in that portion of the Arkansas riverbed within the grant.

The United States took full administrative control over all of the property and affairs of the Cherokee Nation to carry out the provisions of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495 and the Act of July 1, 1902, ch. 1375, 32 Stat. 716, and the allotment of its lands. The Arkansas riverbed was not allotted and remained Cherokee tribal property under the guardianship of the United States.

The United States, assuming that the State of Oklahoma owned the Arkansas riverbed within the Cherokee domain, authorized the construction of the McClellan-Kerr Arkansas River Navigation System under the Flood Control Act of December 22, 1944, ch. 665, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636, by authority of which the Corps of U.S. Army Engineers altered the natural channel of the riverbed, destroyed the sand and gravel assets, and constructed three dams in the riverbed, two of which are generating electricity for profit, although not inuring to the benefit of the Cherokee Nation.

For the loss of its tribal assets thus taken the Cherokee Nation claims just compensation under the Fifth Amendment to the Constitution of the United States.

3. Facts

The Cherokee Nation is a Federally recognized nation of American Indians, whose aboriginal land holdings included parts of the present States of Kentucky, Virginia, North and South Carolina, Georgia, Tennessee, and Alabama. For centuries before the establishment of the United States the Cherokee people controlled over 70,000,000 acres of hunting domain. Hodges, Handbook of American Indians, Bull. 30, Pt. I, Bur. Amer. Eth., p. 245.

Beginning in 1785, the United States executed a treaty of peace and friendship with the Cherokee Nation, in which the boundaries between the lands of the Cherokee Nation and the United States were defined and the Cherokees acknowledged themselves "to be under the protection of the United States of America, and of no other sovereign whosoever." Treaty with the Cherokees, Nov. 28, 1785, art. 3, 7 Stat. 18, 2 Kapp. 8 (Commonly known as Treaty at Hopewell).

In 1791, the United States executed another treaty of peace and friendship with the Cherokee Nation, in which the boundaries between the lands of the Cherokee Nation were redefined in consideration of which the United States "solemnly guarantee to the Cherokee nation, all their lands not hereby ceded." Treaty with the Cherokees, July 2, 1791, art. 7, 7 Stat. 39, 2 Kapp. 29 (Treaty of Holston). The Cherokee Nation further acknowledged themselves "to be under the protection of the said United States of America, and of no other sovereign whosoever; and they also stipulate that the said Cherokee Nation will not hold any treaty with any foreign power, individual state, or with individuals of any state." *Id.* at art. 2. Additionally it was agreed "that the citizens and inhabi-

tants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the navigation of the Tennessee river." *Id.* at art. 5.

As the white settlements expanded and encroached upon Cherokee lands the United States executed a series of treaties in which further cessions of lands were acquired from the Cherokee Nation. Treaty with the Cherokees, June 26, 1794, 7 Stat. 43, 2 Kapp. 33; Treaty with the Cherokees, October 2, 1798, 7 Stat. 62, 2 Kapp. 51.[1]

Even while the United States was making solemn guarantees to the Cherokee Nation regarding its diminishing lands, the Federal Government adopted a policy of completely extinguishing Indian title to the Cherokee aboriginal lands in the east.[2]

By 1803 the United States had acquired the Louisiana Purchase west of the Mississippi River, and it was soon proposed that the eastern tribes be relocated on these western lands. In yet another treaty with the Cherokees additional lands were ceded to the United States. Treaty

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[1] In the Treaty of 1798 the United States acquired the use of the Kentucky road as "an open and free road for use of citizens of the United States . . ." (*Id.* at art. 7).

[2] In an agreement known as the Georgia Compact made between the United States and the State of Georgia on April 24, 1802, Georgia ceded a large area of land to the United States. 28 Am.St.Papers, Public Lands vol. 1, 7th Cong., 1st Sess. 125 (1802). In return the Federal Government promised to extinguish Indian title to certain land within Georgia, but no procedure was specified for fulfilling that promise. While lands ordinarily disencumbered of the Indian occupancy title became part of the public domain, the Georgia pact allowed the lands to become the property of the State. Unfortunately, this redoubled Georgia's interest in Indian removal. F. Cohen, Handbook of Federal Indian Law 79 (1982), *citing* Abel, The History of Events Resulting in Indian Consolidation West of the Mississippi in 1 Ann. Rep. of the Am. Hist.A. 322.

with the Cherokees, Oct. 25, 1805, 7 Stat. 93, 2 Kapp. 82.[3]

By Treaty with the Cherokees, July 8, 1817, 7 Stat. 156, 2 Kapp. 140, the Cherokee Nation agreed to trade part of its lands in Georgia for an equal amount of land in Arkansas Territory;[4] and under the provisions of the Treaty with the Cherokees, February 27, 1819, 7 Stat. 195, 2 Kapp. 177, a number of Cherokees removed to lands provided for them in Arkansas Territory.[5] These Cherokees became known as western or "Old Settler" Cherokees.

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[3] In this treaty the United States acquired the free and unmolested use and enjoyment of two roads. (*Id.* at art. 4).

[4] This treaty provided for an acre-for-acre exchange for land along the Arkansas and White Rivers in what is now the State of Arkansas. It further provided "the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined". (*Id.* at art. 5). As compensation for improvements left behind each Indian was to receive a rifle, ammunition, a blanket, a brass kettel or a beaver trap. (*Id.* at art. 6). It was "also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein." (*Id.* at art. 9).

[5] This treaty forced the Cherokees to either remove to the west or accept 640 acre tracts as reservation lands. (*Id.* at art. 2). It further provided "that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States . . ." (*Id.* at art. 5).

An additional agreement granted certain agents of the States of Tennessee and Georgia permission for a Turnpike Company to establish a public road between the Tennessee and Tugolo Rivers with compensation to the tribe. It provided "said company are to have the benefit of one ferry on Tennessee River, and such other ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time." Cherokee Agreement, March 8, 1813. 2 Kapp. 180. Treaties and Agreements of the Five Civilized Tribes, Institute for the Development of Indian Law, at 30.

Part of the Arkansas lands had been settled by whites, and the Western Cherokees executed the Treaty of May 6, 1828, 7 Stat. 311, 2 Kapp. 288, (*see* App. A) with the United States, in which the Western Cherokees ceded their lands in Arkansas, for lands therein described within the Indian Territory, now the State of Oklahoma. With respect to the lands in Indian Territory the United States "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged". *Id.* at art. 2. The intent of the parties is evident from a plain reading of the same:

> WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, . . . still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; . . . do hereby conclude the following Articles, . . .

Id. at preamble.

The Federal government agreed to remove all intruders from the Cherokee lands in Indian Territory and keep

them out;[6] and reserved a military post within said lands at Fort Gibson, on the Grand River, and the right to run a road through Cherokee lands to and from said Fort.[7]

In 1829 the States of Georgia, Mississippi and Alabama extended their laws over the Cherokee domain, and the United States refused to intervene, claiming that the States had a right to do so. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 642-643 (1970); *Creek Nation v. United States*, 26 Ind. Cl. Comm. 410, (1971), 201 Ct. Cl. 386 (1973), 476 F.2d 1290 (1973); *See* Grant Foreman, Indian Removal, pp. 229-233 (New Ed. 1953).

Congress passed the Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411, providing for the exchange of Indian tribal lands in the East for lands in the West, and the removal of tribes to land west of the Mississippi, and that the "United States will forever secure and guaranty to them and their heirs, or successors, the country exchanged with them," and that "the United States will cause a patent or grant to be made and executed to them

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[6] Article 3 provides "The United States agree . . . to remove . . . all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the west of said line in future."

Article 8 provides that the western Cherokees "having . . . freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country;"

[7] In Article 9 the United States reserved a 2 x 6 mile tract of land for Fort Gibson, and further provided "And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort."

for the same". *Ibid.* The Act further provided that the tribes would "be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever." *Ibid.*

After the passage of this Act the Government pursued a more aggressive policy of trying to move the Eastern Cherokee Nation to the Cherokee lands west of the Mississippi River. The Cherokee Nation sought relief in the Courts in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, this Court recognized the sovereignty of the Cherokee Nation.[8]

The United States eliminated a conflict between the Cherokee and Creek Nations over the boundaries of the western lands by Treaty with the Western Cherokees, February 14, 1833, 7 Stat. 414, 2 Kapp. 385. (*See* App. B) In Article 1, the United States again "agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged", the lands within the adjusted boundaries described in the treaty, with the proviso

> that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

As of this time the major portion of the Cherokee nation still remained in the east. However, the white

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[8] The opinion emphasized the equality and "mutual consent" of the parties to the Treaty of Holston and described the agreement as containing "stipulations which could be made only with a nation admitted to be capable of governing itself". F. Cohen, Handbook of Federal Indian Law 73 (1982), citing *Worcester* 31, U.S. (6 Pet.) at 555-556.

settlements continued to expand and encroach upon the Cherokee lands there. Ultimately, the United States enforced upon the Cherokee Nation the Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp. 439, (*See* App. C) executed by a small group of eastern Cherokees, but never accepted as a valid treaty by the great majority of the Cherokee Nation. In 1838, the eastern Cherokees were moved by military forces of the United States to Cherokee lands west of the Mississippi River. *Western Cherokee Indians v. United States*, 27 Ct. Cl. 1 (1891). This removal is referred to as the "Trail of Tears".[9]

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[9] The history of this Cherokee removal of 1838, as gleaned by the author from the lips of actors in the tragedy, may well exceed in weight of grief and pathos any other passage in American history. Even much-sung exile of the Acadians falls far behind it in its sum of death and misery. Under Scott's orders the troops were disposed at various points throughout the Cherokee country, where stockade forts were erected for gathering in and holding the Indians preparatory to removal. From these, squads of troops were sent to search out with rifle and bayonet every small cabin hidden away in the coves or by the sides of mountain streams, to seize and bring in as prisoners all the occupants, however or wherever they might be found. Families at dinner were startled by the sudden gleam of bayonets in the doorway and rose up to be driven with blows and oaths along the weary miles of trail that led to the stockade. Men were seized in their fields or going along the road, women were taken from their wheels and children from their play. In many cases, on turning for one last look as they crossed the ridge, they saw their homes in flames, fired by the lawless rabble that followed on the heels of the soldiers to loot and pillage. So keen were these outlaws on the scent that in some instances they were driving off the cattle and other stock of the Indians almost before the soldiers had fairly started the owners in the other direction. Systematic hunts were made by the same men for Indians graves, to rob them of the silver pendants and other valuables deposited with the dead. A Georgia volunteer, afterward a colonel in the Confederate service, said: 'I fought through the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew'. Foreman, *Indian Removal* 287 (1932) *quoting* from J. Mooney, *Myths of the Cherokee* (Nineteenth Report, Bureau of American Ethnology, pt. I, Washington, 1900) at 130.

By the terms of the Treaty of New Echota the Cherokee Nation ceded to the United States all of the lands owned by it in the east, and agreed to remove to and unite with the western Cherokee on lands described in the treaty which the United States guaranteed and secured to be conveyed by patent to the Cherokee Nation and provided for the same reserved right to allow other tribes to use the salt plain (7 Stat. 478, arts. 1 and 2, 2 Kapp. 440).

Therein also the United States agreed that the Cherokee Nation would have the right of self government within its domain, and that the Cherokee Nation would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory". *Id.* at art. 5. The United States further promised that the Cherokee Nation would "be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States." *Id.* at art. 6.

The United States reserved a military reservation, providing;

> . . . should the United States abandon said post and have no further use of the same it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interferred with, just compensation therefor shall be made. (*Id.* art. 3).

On December 31, 1838, President Martin Van Buren issued the patent granting to the Cherokee Nation the fee simple title to the Cherokee domain in Indian Terri-

tory. (*See* App. D) After reciting the pertinent provisions of the Cherokee Treaties of May 6, 1828, February 14, 1833, and December 29, 1835 therein, the patent provided:

> THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:
>
> TO HAVE AND HOLD THE SAME together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.

The United States made the following three reservation in the patent:

> "(1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be

> within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities . . ." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 636-637 (1970) (Mr. Justice Douglas, concurring).

Again in the Cherokee Treaty of July 19, 1866, 14 Stat. 799, 2 Kapp. 942, Article 2 provided that "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country"; and in Article 27 it was provided that the United States would remove persons not lawfully residing or sojourning within the Cherokee Nation, "as they now are, or hereafter may be, required by the Indian intercourse laws of the United States."

The white settlements eventually surrounded the Cherokee domain in the west, and in 1886, an expansionist Federal government attacked "as absurd" the Cherokee treaties and the solemn guarantees contained therein that the western Cherokee domain "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory", and the right of the Cherokee Nation to self-government under its own laws. *Choctaw Nation*, 397 U.S. at 640-641 (1970).

To further this changed policy, by Act of March 3, 1893, ch. 209, 27 Stat. 612, 645, the United States appointed a commission to negotiate with the Five Civilized Tribes:

> . . . for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes

> aforesaid, or each of th
> with a view to such an
> of justice and equity,
> such nations or tribes
> necessary, be requisite a
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> shall embrace the lands

The commission, known found all of these tribes qui wishes of the Government, *States*, 102 Ct. Cl. 565, 62 years, the tribes fought the execute such agreements wit what is known as the Curtis 30 Stat. 495, directing such forced to execute agreemen ment. *Creek Nation v. Unit* 238, 255-258 (1970).

The Cherokee Nation cont States, without its consent, tive control over its propert visions of the Curtis Act o Stat. 495. However, this C *Hitchcock*, 187 U.S. 294, Congress, under its plenary had authority to do so. The out at p. 307, that "There i case as to the taking of prope

The Cherokee Nation ult July 1, 1902, ch. 1375, 32 allotment of the tribal lan the Cherokee Nation. Unde assumed full administrative erty and affairs of the Cher provisions of the Curtis Act *Nation v. Hitchcock*, 187 U.S

m, with the United States, adjustment, upon the basis s may, with the consent of Indians, so far as may be d suitable to enable the ulti- or States of the Union which ithin said Indian Territory.

as the Dawes Commission, e reluctant to accede to the *Seminole Nation v. United* -629 (1945), and for some fforts of the Commission to them. But Congress passed Act, June 28, 1898, ch. 517, hanges, and the tribes were s with the Federal govern- *d States*, 24 Ind. Cl. Comm.

sted the right of the United o take over full administra- and affairs under the pro- June 28, 1898, ch. 517, 30 urt, in *Cherokee Nation v.* 06, 307 (1902), held that power over Indian Affairs, Court was careful to point no question involved in this ty".

mately accepted the Act of tat. 716, providing for the s to individual members of this Act the United States control over all of the prop- kee Nation to carry out the and the 1902 Act. *Cherokee* at 306-308.

The bed of the Arkansas River was not allotted, and under the patent issued by the United States to the Cherokee Nation in 1838 the fee simple title to the Arkansas riverbed was vested in the Cherokee Nation, and held in trust by the United States for the use and benefit of the Cherokee Nation, its dependent Indian ward. *Choctaw Nation v. United States*, 397 U.S. 620, 627 (1970).

In the Five Civilized Tribes Act of 1906 providing for the final disposition of tribal affairs Congress declared that tribal lands would become trust property:

> That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, upon the dissolution of said tribes, *shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians* . . . (Underscoring ours)

Act of April 26, 1906, ch. 1876, 34 Stat. 137, 148, Section 27.

SUMMARY OF ARGUMENT

A fiduciary relationship existed between the United States and the Cherokee Nation, the United States being the trustee, and the Cherokee Nation, being its dependent Indian ward. In its dealings with this dependent Indian ward, the conduct of the United States as disclosed in the acts of those who represent it should be judged by the "most exacting fiduciary standards".

As such trustee, the United States has full power to control and manage the property and affairs of an Indian tribe, and can take all measures for protecting and advancing the tribe, but it cannot constitutionally give tribal lands to others, or appropriate them to its own purposes, without the payment of just compensation therefor under the Fifth Amendment to the Constitution of the United States.

The Cherokee Treaties of 1828, 1833 and 1835 disclose an intent by both the United States and the Chero-

kee Nation to separate permanently the Cherokee domain in Indian Territory from the States or Territories; and to give the Cherokee Nation the full right of self-government under its own tribal laws; in fact, to make it an "independent country". *Atlantic and Pacific R. Co. v. Mingus*, 165 U.S. 413, 435-436 (1897).

The United States made no provision for a navigational easement in these Cherokee Treaties, nor did it do so in the patent of 1838; and, therefore, the Cherokee Nation was granted the fee simple title to the bed of the Arkansas River within its domain, and it became private property subject only to the laws of the Cherokee Nation.

The treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor. *See*, e.g. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 642 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

As the grant of fee simple title to the Arkansas riverbed to the Cherokee Nation came directly from the United States, the equal footing doctrine and rights acquired thereunder have no application to these Cherokee tribal lands; and neither the State of Oklahoma nor any riparian owner under that State's laws, acquired any rights in the Arkansas riverbed within the Cherokee domain.

When the officers of the United States, under authority of the Flood Control Act of 1944, and the Rivers and Harbors Act of 1946, entered upon the privately owned Arkansas riverbed of the Cherokee Nation, and without its consent, destroyed the sand and gravel assets, and built three dams on said lands, without providing for the payment of just compensation therefor, the United States, as trustee for the Cherokee Nation, appropriated said riverbed lands for its own public purposes, and under the decisions quoted herein must make just compen-

sation to the Cherokee Nation, the Indian ward, for the tribal lands taken, according to the Fifth Amendment to the Constitution of the United States.

ARGUMENT

PLAINTIFF'S LEGAL AND EQUITABLE CLAIM UNDER CLAUSES 1 AND 4 INDIAN CLAIMS COMMISSION ACT

Plaintiff has alleged and claims that the United States, through action of its executive branches—the Corps of U.S. Army Engineers and the Southwest Power Administration—has "taken" that portion of its Arkansas riverbed involved herein, and owned by plaintiff in fee simple, under the Flood Control Act of December 22, 1944, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, 60 Stat. 634, 635-636, for its own public uses, without the consent of plaintiff, and without the payment to plaintiff of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States. (Jt. Append. 6). An examination of these Acts shows that no compensation was provided therein to pay the Cherokee Nation for this Cherokee tribal property thus taken, which as of the date of taking, constituted property held in trust by the United States for its dependent Indian ward.

This is a legal and equitable claim under clauses 1 and 4 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049-50, arising out of Cherokee treaties, Acts to Congress and the Constitution of the United States. (Br. Op. Cert. App. C 9a).

A. The Fiduciary Relationship

This case is unique in that a *fiduciary relationship* exists between the United States and the Cherokee Nation of Oklahoma, and constitutes an essential element to be considered by this Court in the decision of this case.

In defining this trust relationship of the United States toward its Indian wards, this Court, in *Seminole Nation v. United States*, 316 U.S. 286 (1942), at pages 296-297, stated:

> Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E.g. *Cherokee Nation v. Georgia*, 5 Pet. 1; *United States v. Kagama*, 118 U.S. 375; *Choctaw Nation v. United States*, 119 U.S. 1; *United States v. Pelican*, 232 U.S. 442; *United States v. Creek Nation*, 295 U.S. 103; *Tulee v. Washington*, 315 U.S. 681. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the *most exacting fiduciary standards.* (emphasis added).

In support of this holding this Court quoted the classic definition of the fiduciary relationship by Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928):

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct

> for fiduciaries been kept at a level higher than that trodden by the crowd.

This trust relationship, applicable to this case, creates a duty in the United States to control and manage tribal interests. This duty to control and manage cannot be obviated by a servitude the existence of which was never mentioned in the same treaties and patent which established vested Cherokee property rights. The United States offers no explanation for its abandonment of this duty.

B. The Fifth Amendment Taking

The Flood Control Act of December 22, 1944, 58 Stat. 887, 895, and the Rivers and Harbors Act of July 24, 1946, 60 Stat. 634, 635-36, provided no compensation to the Cherokee Nation for its Arkansas riverbed lands taken by the United States for its own public purposes. The Cherokee Nation would submit that when trust lands of an Indian tribe are taken under acts of Congress which provide for no just compensation to be paid the tribe therefor, the United States becomes liable to the tribe for the taking under the Fifth Amendment to the Constitution of the United States.

In *United States v. Creek Nation*, 295 U.S. 103 (1935), this Court held that as guardian of the property of an Indian tribe the United States can manage and control the trust property, but it cannot give it away to others *or use it for its own purposes* without becoming liable to the tribe therefor. This Court stated:

> A question is raised as to whether there was an appropriation or taking of the lands by the United States. The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and man-

> agement of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation". *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308.
>
> Such was the situation when the lands in question were disposed of under the Act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.
>
> . . . .
>
> We conclude that the lands were appropriated by the United States in circumstances which involved an implied understanding by it to make just compensation to the tribe.

Id. at 109-11.

This case has been followed in many subsequent cases. In the recent case of *Sioux Nation v. United States*, 220 Ct. Cls. 442, 465 (1979), affirmed in *United States v. Sioux Nation*, 448 U.S. 371 (1980), the lands of the Sioux Nation were "taken" under an act of Congress that did not provide for just compensation to be paid to the tribe therefor. In its decision this Court quoted from the decision in the Creek Nation case, and awarded the tribe the fair market value of the lands taken under the Act of February 28, 1877, plus an increment to that value to make the tribe whole as of today for a taking that occurred in 1877.

The court in *Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), stated, at pp. 553 and 557:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.
>
> . . .
>
> In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.

In neither the Flood Control Act of 1944, nor the Rivers and Harbors Act of 1946 was any provision made for payment to the Cherokee Nation for the construction of the three dams on the Arkansas riverbed owned in fee simple by the Cherokee Nation. More importantly, there is no showing of legislative intent to appropriate tribal trust property without compensation.[10] Certainly the United States can directly appropriate Cherokee prop-

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[10] In fact, until the Cherokee Nation successfully quieted its title to the bed and banks of the Arkansas River, it was widely believed that the State of Oklahoma held title to the same. *State v. Nolegs*, 139 P. 943, 945 (1914); *Vickery v. Yahola Sand and Gravel Co.*, 12 P.2d 881, 882 (1932); *Lynch v. Clements*, 263 P.2d 153, 156-57 (1953).

erty through condemnation, an inherent power of sovereignty to which the Cherokees have always been subject. *Federal Power Com. v. Tuscarora Indian Nation*, 362 U.S. 99, 120-21 (1960); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890).[11] However, to take confirmed tribal property rights held in trust by the United States, this Court has required the same clear expression of legislative intent as required to abrogate treaties.[12] Moreover, this Court has never permitted the appropriation of tribal trust property without just compensation.

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[11] The Tuscaroras held title in fee with no interest in the United States. Their title came from an independent third party and was "freed from the effects of all then existing treaties". 121 n. 18.

[12] In *United States v. Santa Fe Pacific Ry.*, 314 U.S. 339 (1941), a unanimous Court opinion by Justice Douglas, declined to construe certain statutes as abrogating Indian property rights to lands over which the railroad claimed a right of way. This Court held that "an extinquishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." (*Id.* at 354). Also this Court has observed that the usual principle that tax exemptions should be narrowly construed should yield to a "liberal" resolution of "doubtful expressions . . . in favor of a weak and defenseless people, who are wards of the nation . . ." *Choate v. Trapp*, 224 U.S. 665, 675 (1912). See *Squire v. Capoeman*, 351 U.S. 1 (1956). Similarly an act of Congress establishing a reservation on "the body of lands known as Annette Islands" was decided by this Court to include adjacent waters and submerged lands as "the Indians could not sustain themselves from the use of the upland alone." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). See also *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946).

In one recent decision, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), this Court has held that a reservation created by treaty which stated the lands "be held as Indian lands are held" implicitly included hunting and fishing rights. (*Id.* at 405-406). This Court also held that these rights were not annulled by a subsequent act terminating the federal guardianship over the tribe, even though the act was silent as to preservation of these rights. (*Id.* at 412-413). *See*, generally, Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

It would be wholly inconsistent with the purpose and plain meaning of the treaties and patent to allow the federal government to construct a vast navigation way over tribal trust property "without rendering, or assuming an obligation to render, just compensation . . ." *Creek Nation*, 295 U.S. at 110. This Cherokee tribal property was held in trust by the United States for its Indian ward, the Cherokee Nation, and said lands were taken by the United States for its own public purposes without the consent of the Cherokee Nation, and without the payment of just compensation to the Cherokee Nation therefor, in violation of the Fifth Amendment to the Constitution of the United States. For these takings, the United States is liable to its dependent Indian ward in violation of its duties as guardian of the Cherokee Nation, under the well established principles set forth in the above *Creek*, *Sioux* and *Fort Berthold Reservation* decisions.

C. Navigational Servitude

Notwithstanding the long established principles governing the fiduciary relationship existing between the United States and the Cherokee Nation, set forth above, the United States now contends that it can invoke a navigational servitude in the riverbed of the Arkansas River located in the domain of the Cherokee Nation, and that it can confiscate this Cherokee tribal property, held in trust by the United States for the Cherokee Nation, under the Flood Control Act of 1944 and the Rivers and Harbors Act of 1946, and use it for public purposes of the United States, without assuming any obligation to pay compensation to its dependent Indian ward. This contention ignores the historical basis for the doctrine of navigational servitude. When the United States conveyed fee simple title to the navigable Arkansas River to the Cherokee Nation, it no longer had a reason to retain a navigational servitude. In view of the treaty promises the river was not intended as a public highway or artery of commerce. The Cherokee Nation does not dispute that the naviga-

tional servitude is a vestige of sovereignty; it is the responsibility of the sovereign to hold public waterways and to improve them for all the people. However, when the sovereign totally conveys away such property to achieve a valid public purpose, the reason for the servitude ceases. Indeed, such a servitude cannot be implied in this case for to do so would undercut the very heart of the treaty promises made. *Jones v. Meehan*, 175 U.S. 1 (1899); *Blue Jacket v. Johnson County*, 72 U.S. (5 Wall.) 737 (1867). Once conveyed to the Cherokee Nation, the bed of the Arkansas River, while not subject to any servitude, was like any other Indian property, *subject to the power* of the United States to be taken under the Constitution.

Both the navigational easement and the power to regulate Indian affairs have their origin in the same commerce clause of the United States Constitution. In *Creek Nation v. United States*, 78 Ct.Cl. 474 (1933), at p. 485, the Court of Claims held:

> That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Cherokee Nation v. Hitchcock*, 187 U.S. 294; *Lone Wolf v. Hitchcock*, 187 U.S. 553. . . .

This power is not absolute, but subject to "pertinent constitutional restrictions". *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *United States v. Cress*, 243 U.S. 316, 326 (1916).

In this case, the court of appeals held, consistent with *Choctaw Nation*, that although the navigational easement was not expressly reserved in the Cherokee patent, the power to exercise it existed, but:

> When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

> *The navigational servitude is not without constitutional limitation.* Furthermore, if Indian property is taken for non-Indian use within this context, constitutional strictures are equally applicable.

782 F.2d 871 (10th Cir. 1986); Pet. for Cert., App. A, 10a.

The circuit court's holding follows this Court's opinion in *United States v. Cress*, 243 U. S. 316 (1916), wherein it was held that the navigational servitude is not absolute, but is subject to the 5th Amendment when private property is taken thereunder for public purposes. This Court stated, at page 326:

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, must be exercised, when private property is taken, in subordination to the 5th Amendment." [citing Monongahela Nav. Co. v. United States, 148 U. S. 312, 336].

This Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), has also recognized that the navigational easement is not absolute:

> . . . (T)his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."

Id. at 175, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The United States admits this (Brief at 22). When the public right of free passage operates to destroy Cherokee property then "justice and fairness" compel compensation by the government.

In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court held that by the patent to the Cherokee Nation

the United States granted the Arkansas riverbed to the Cherokee Nation without reservation; and that these Cherokee tribal lands were held in trust by the United States for the Cherokee Nation. In doing so, the majority opinion stated:

> As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See Atlantic & Pacific R. Co. v. Mingus, 165 US 413, 435-436, 41 L Ed 770, 779, 17 S Ct 348 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. Pollard v. Hagan, 3 How. 212, 229, 11 L Ed 565, 573 (1845).

Id. at 635.

The reference in *Choctaw* to the navigational easement in this privately owned riverbed was not related to the issues. Rights were being determined between the Cherokee Nation and Oklahoma and certain lessees. Indeed, the issues in *Choctaw* were limited to the status of present title to the riverbed and the application of the equal footing doctrine. The issues of navigational servitude, trust responsibility, and just compensation were not fully briefed or argued to this Court in *Choctaw*. More importantly, the servitude's right-of-way for navigation

would not be affected even if this Court determines the Cherokees rights are compensable. "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access . . . if it chose. Whether a statute or regulation that went so far amounted to a 'taking', however, is an entirely separate question". *Kaiser Aetna*, 444 U.S. at 174 (citations omitted).

Under the doctrines articulated by this Court in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922), the United States as sovereign in the accomplishment of a valid public purpose was unrestricted in its ability to transfer fee simple title in what might be otherwise considered "public lands." It was also made clear that title once vested cannot be divested. *Id.* at 88. The "constitutional principal of equality among the several states," *United States v. Holt State Bank*, 270 U.S. 49, 55 (1925), insures that "the navigable waters and the soils under, . . . shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishing, . . . shall not be granted away . . ." *Brewer-Elliott*, 260 U.S. at 35, *citing Shively v. Bowlby*, 152 U.S. 1, 48 (1894). By a parity of reasoning having transferred fee simple title absolutely, with the promise of freedom from State jurisdiction, the United States Government cannot now impose restrictions or servitudes which were not set forth in the treaties or patent. The United States in its sovereign authority under Article 1, Section 8, Clause 3 of the Constitution transferred fee simple title to the Cherokee domain subject to limited specific easements and right of passage. There was no navigational servitude mentioned. Clearly a navigational servitude for the general public would be inconsistent with the basic premises of the treaties and patent and violative of the promises made to the Cherokee Nation.

The navigational servitude is an implied right of the United States arising from judicial construction of the

interstate commerce clause.[13] The right has since been applied only to navigable *public* streams, and has not been applied to *private* streams, such as that part of the Arkansas River owned in fee simple by the Cherokee Nation. In the East, before its forced migration, the Cherokee Nation controlled all water courses within its domain, and it certainly would have intended to have the same control over the water courses in the West which were exchanged for those in the East; particularly in light of the fact that the United States solemnly promised the Cherokee Nation in its treaties that no state or territory would be created encompassing its western domain without its consent, and that all intruders would be expelled from its domain in the West.

The patent of the United States granting the absolute fee simple title of the Arkansas riverbed to the Cherokee Nation within its domain, pursuant to the solemn promises in the Cherokee treaties of 1828, 1833 and 1835, was issued on December 31, 1838. *Cherokee Nation v. United States*, 9 Ind. Cl. Comm. 162, 163 (1961). Therein the United States made no mention of a navigational servitude in that part of the Arkansas riverbed covered by the patent. It is evident from the historical course of dealing with the Cherokee Nation that the United States made specific reservation of access through their lands. The Arkansas River never was mentioned except by reference to metes and bounds description.

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[13] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). *Gibbons* recognized the navigation power as a court-created incident of the constitutional power to regulate interstate commerce. However, it was not until this Court's pronouncement in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), that navigable waters were recognized as extending beyond tidal waters for purposes of admiralty jurisdiction. Later, for purposes of navigation, "navigable-in-fact" was considered navigable in law. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). This judicial construction arose subsequent to the fee patent of 1838, executed by President Martin Van Buren to the Cherokee Nation.

D. The Taking of Private Property and the Right of Navigation

While the Cherokee Nation is subject to the Constitution and all that it entails, its property is not subject to the servitude without payment of consideration for destroyed property rights. The United States must invoke its power of eminent domain and make just compensation.

The navigational easement has been applied solely to public navigable waters of the United States, or such waters as were transferred to the States under the equal footing doctrine. As this Court held, this equal footing doctrine did not apply to that portion of the Arkansas riverbed conveyed in fee simple to the Cherokee Nation by patent in 1838, long before the State of Oklahoma came into existence and entered the Union in 1907. *Choctaw Nation v. Oklahoma*, 397 U.S. at 635.

The case of *Montana v. United States*, 450 U.S. 544 (1981), and other similar cases cited herein by the Government, has no application to the present proceedings. In *Montana* the state acquired the bed of a navigable *public* stream under the equal footing doctrine, subject to the navigational easement of the United States. The treaty involved in *Montana* failed to overcome the presumption of the equal footing doctrine that the Government held lands under navigable waters in trust for future states. *Id.* at 553. No direct grant of fee simple title from the United States to an Indian tribe, including the riverbed of a navigable stream, was involved. Moreover, *Montana* did not address the taking of tribal trust property within the Big Horn River, since no property rights were involved. In fact, neither *Montana* nor *Choctaw* discussed the central issue here; whether compensation would be due for a "taking" of tribal trust property for use in a navigation way.

This Court in *Montana* distinguished *Choctaw*, stating in part: ". . . the finding of a conveyance of the riverbed

in Choctaw Nation was based on very peculiar circumstances not present in this case." *Id.* at 555, n. 5. The decision noted the repeated betrayal by the Government and that Georgia and Mississippi were "anxious for the relocation westward". (ibid.) After viewing these special circumstances this Court stated:

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868. (*Ibid.*)

As with the *Montana* case, the other cases cited by the Government have no application to this Cherokee case.[14] They involve no direct grant of fee simple title from the United States to the Indian tribe; and apply solely to *public* streams acquired under the equal footing doctrine, which are subject to the navigational easement of the United States. In this Cherokee case, by direct grant, the United States transferred fee simple title to the Arkansas riverbed to the Cherokee Nation, and the equal footing doctrine does not apply. The United States agreed that the Cherokee Nation would have the right of self-government within its domain, and that its western domain would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." Treaty of New Echota, Art. 5. The promise of freedom from state jurisdiction evidences the inapplicability of the equal footing doctrine in that land never intended to become a part of any state cannot now be presumed to have been reserved by the United States for the benefit of future states. No future state was contemplated in 1838. Other cases cited by appellant involve no fiduciary relationship between the parties, nor was the injured party an Indian nation to whom the United States had made specific promises and, more signifi-

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[14] Brief of United States, 20 n.14.

cantly, in none of these cases has the United States undertaken the care and protection of the injured party.

The recent case of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), sheds considerable light upon the issues herein presented, even though a fiduciary relationship did not exist between the parties. Therein this Court held that the navigational easement of the United States was not absolute, and that when a privately owned navigable waterway was taken by the United States thereunder, the United States was required to pay just compensation therefor under the Fifth Amendment to the Constitution of the United States. In *Kaiser Aetna*, an owner of a shallow fish pond converted it into a navigable waterway by dredging a channel through it to a navigable bay, an outlet to the Pacific Ocean. The United States asserted its navigational easement in the converted fish pond. This Court held that the United States could not convert this private property into a public waterway without effecting a "taking" under the power of eminent domain, which required the payment of just compensation to the fee owner therefor, under the Fifth Amendment to the Constitution of the United States. In so holding, this Court stated:

> As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case".

Id. at 171. Further this Court concluded:

> . . . In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within the category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result

> in an actual physical invasion of the privately owned marina. . . . Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond . . . .

Id. at 179-80.

In *Kaiser Aetna* this Court mentioned the cost to the fee title owner in dredging to create a navigable waterway of the private pond. If such consideration constitutes a factor, The Cherokee Nation paid a far greater cost for securing its privacy in that portion of the Arkansas riverbed within the Cherokee domain in the west. The large majority of the Cherokee Nation suffered the forced removal from their farms and homes in a mild climate, and the loss of their personal property. In traveling over muddy and snow covered roads, without adequate clothing and food, the Cherokees also suffered the loss of the lives of many of their members—men, women and children. *See*, G. Foreman, *Indian Removal*, 294-312 (New Ed. 1953).

In this Cherokee case the United States in 1838 conveyed by patent to the Cherokee Nation the absolute fee simple title to the Arkansas riverbed within the Cherokee domain, in accordance with its solemn promises contained in the Cherokee treaties of 1828, 1833, and 1835. No navigational easement in said portion of the Arkansas riverbed was mentioned in the patent, treaties, or in the negotiations leading to these treaties with the Cherokee Nation. Therefore, that portion of the Arkansas riverbed located within the Cherokee domain became the absolute private property of the Cherokee Nation. Just as Kuapa Pond in *Kaiser Aetna* had always been considered private property under Hawaiian law, that portion of the Arkansas riverbed within Cherokee domain, was consid-

ered to be the private property of the Cherokees pursuant to their treaty rights.

The Cherokee "right to exclude" was guaranteed by treaty and patent. Fee simple title coupled with the promises that the Cherokees land would be "protected against interruption and intrusion from citizens of the United States" and "never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State," created more than an "economic advantage". Rather, an economic advantage "that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'" *Kaiser Aetna*, 444 U.S. at 178, *citing United States v. Willow River Power Co.*, 324 U.S. 499, 502. More than seventy years after this treaty Congress reconfirmed the private status of Cherokee property: "that the lands belonging to the . . . Cherokee . . . shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians . . . ." Act of April 26, 1906, ch. 1876, 34 Stat. 137, Section 27.

When the United States Corps of Army Engineers, under the Flood Control Act of 1944 and the Rivers and Harbors Act of 1946, entered this privately owned waterway without the consent of the fee title owner, altered its natural course, dredged a main channel, destroyed the valuable sand and gravel assets of the Cherokee Nation, rendered oil, gas, and coal deposits inaccessable; and built three dams on the riverbed, the United States took this private property from the Cherokee Nation and converted it to its own public uses; and, therefore, it is required to pay just compensation to the Cherokee Nation, the fee title owner, under the Fifth Amendment to the Constitution of the United States.

The Government herein seeks to impose the servitude without the commensurate duty to pay by ignoring a cru-

cial fact: that a *fiduciary relationship* existed between the United States, the guardian, and the Cherokee Nation, the dependent Indian ward, which required the United States to manage and control and advance and preserve the trust property for the benefit of its Indian ward. When the United States took this trust property for its own public uses, that was not an act of guardianship, but an act of confiscation; and, therefore, the United States was required to pay just compensation therefore under the Fifth Amendment to the Constitution of the United States. *United States v. Creek Nation*, 295 U.S. 103 (1935); *Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968): *United States v. Sioux Nation*, 448 U.S. 371 (1980).

As Mr. Justice Black so ably dissented in *Federal Power Com. v. Tuscarora*, 362 U.S. at 142:

> There may be instances in which Congress has broken faith with the Indians, although examples of such actions have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word.

Finally, the Government argues that the Cherokees have already admitted the servitude applies to the Arkansas. The Cherokee Nation certainly does not disown previous statements to this Court. However, the United States overlooks the crucial question in this case: whether the United States may impose the servitude without compensation. The United States supported the Cherokees in their claim to establish their property interests in the riverbed. Now the United States has abandoned them in this, their just claim for destruction of those same property rights. The Cherokee Nation never admitted that no compensation was due. Congress itself recognized the right of the Cherokee Nation to seek legal remedy by enacting the special jurisdictional act permitting this

suit. Act of December 23, 1982, Pub. L. No. 99-385, 96 Stat. 1944. Brief in Opp. Cert. App. B, 7a.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

TREATY WITH THE WESTERN CHEROKEE, 1828.

May 6, 1828, 7 Stat. 311, 2 Kapp. 288

WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokee being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; and, Whereas, it being important, not to the Cherokees only, but also to the Choctaws, and

in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

* * * *

ART. 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: [descriptions omitted]

* * * In addition * * * the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extended.

ART. 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any other sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * * *

ART. 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location

BEST A

amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. * * *

ART. 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neasho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two mile distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

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APPENDIX B

TREATY WITH THE WESTERN CHEROKEE, 1833.

February 14, 1833, 7 Stat. 414, 2 Kapp. 385

WHEREAS articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; [description omitted] * * * The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. * * *

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: [description omitted] * * *. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend—

Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cheerokees—and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

APPENDIX C

TREATY WITH THE CHEROKEE, 1835.

December 29, 1835, 7 Stat. 478, 2 Kapp. 439

WHEREAS the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

* * * *

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river.
* * *

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country [description omitted]. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven

millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied."

ARTICLE 3. The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging

to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

APPENDIX D

Excerpts—Cherokee Patent, 1838

THE UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians** it was stipulated and agreed on the part of the United States,** the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are** in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three,** the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians,** SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits** the right is reserved to the United States to

permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS,** hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land;**

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty.**

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private

rights of individuals are interfered with, a just compensation therefor shall be made."—

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square** on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river;** thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas,** thence south fifty three degrees west, one mile, to a post** thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock** thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river,*** thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high**thence west on the southern

boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river;** thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square** thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square** thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.—

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof**

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of lands so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article

of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.—

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President — M. VAN BUREN

M.M. GARLAND
Recorder of the General Land Office

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1940

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Cherokee Nation presents three basic arguments in support of its claim that the United States must pay compensation when the government's navigational improvements impair tribal property located within the bed of the Arkansas River. The Tribe contends, first, that the United States failed to reserve a navigational servitude in the 1838 patent that granted the Tribe its fee simple interest in the Arkansas River bed (Resp. Br. 23-24, 27, 28, 32); second, that compensation must be paid because the United States owes a trust obligation to the Tribe (*id.* at 17-23, 33-34); and third, that this Court's decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), indicates that the Tribe is entitled to compensation (Resp. Br. 25, 31-33). None of these arguments survives scrutiny.

1. As we explained in our opening brief (at 28-30), the Cherokee Nation, like any other owner of lands beneath navigable waters, took its riverbed interest subject to the United States' dominant power to regulate and control navigation. Even the court below agreed that, by virtue of the Commerce Clause, "it is certain the United States re-

tained a navigational servitude in the Arkansas River" (Pet. App. 9a). The Tribe's assertion that the Arkansas River is a "private stream" (Resp. Br. 28; see also *id.* at 23-24, 27, 29) finds no support in law or fact. This Court has repeatedly stated that, as a legal matter, navigable waterways are "public property of the nation, and subject to all the requisite legislation by Congress."[1] And as we explain in our opening brief (at 2-6, 32-33) the Arkansas River, as a factual matter, has been an important public artery since the early nineteenth century. Plainly, there can be no dispute that the United States retains a navigational servitude in the Arkansas River.[2]

2. The Cherokee Nation's argument that trust principles require compensation is likewise meritless. As a prerequisite to any takings claim, a plaintiff must identify

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[1] *Wyandotte Co.* v. *United States,* 389 U.S. 191, 201 (1967); *United States* v. *Rands,* 389 U.S. 121, 123 (1967); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941); *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724-725 (1865); see also *Kaiser Aetna* v. *United States,* 444 U.S. 164, 179 (1979); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 228 (1956); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913).

[2] The Cherokee Nation argues that "[w]hen the United States conveyed fee simple title to the navigable Arkansas River to the Cherokee Nation, it no longer had a reason to retain a navigational servitude" (Resp. Br. 23). That statement inverts this Court's reasoning in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970). In confirming the Cherokee Nation's title to the bed of the Arkansas River, the Court stated that "the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce" (*id.* at 635).

The Cherokee Nation also suggests at one point (Resp. Br. 34) that even if the United States can exercise its navigational servitude, that does not determine the Tribe's right to compensation. However, as we explain in our opening brief (at 17-22), the existence of a navigational servitude, by definition, exempts the United States from any obligation to pay compensation when the construction of a navigational improvement project impairs property within the bed of a naturally navigable body of water.

a property interest that is cognizable under the Fifth Amendment. See, *e.g.*, *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 11. It is well settled that the "existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). The Cherokee Nation is entitled to compensation only if the McClellan-Kerr Project has deprived the Tribe of a legally recognized property interest in the bed of the Arkansas River. But the very concept of a federal navigational servitude is based upon the *absence* of any such rights.[3]

Thus, the fact that the United States may exercise trust responsibilities with respect to the Tribe's property interests is irrelevant to the takings inquiry. A trust relationship may create an obligation to administer or protect property rights already in existence (see, *e.g.*, Restatement (Second) of Trusts § 2 (1959)), but it cannot create property rights where none would otherwise exist. Here, the Cherokee Nation has no greater property rights in submerged lands than a state, a private individual, or other non-federal entities. The existence of a trust relationship does not alter that fundamental fact. If, as we contend, the navigational servitude exists, its exercise constitutes neither a breach of trust nor a taking of property.[4]

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[3] This Court has expressly stated that the application of the navigational servitude "is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, 389 U.S. 121, 123 (1967). See also *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897).

[4] Indeed, the very cases the Tribe relies upon—*United States* v. *Sioux Nation*, 448 U.S. 371 (1980), *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), and *United States* v. *Creek Nation*, 295 U.S. 103

3. The Tribe's claim for compensation gains no support from this Court's decision in *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), which held that the United States could not invoke its navigational servitude to require the owners of a shallow private pond, made navigable by private efforts, to open the pond for public use. This Court recognized that *Kaiser Aetna* posed an unusual fact situation that was "so different from typical ones involved in riparian condemnation cases" (*id.* at 176) and that involved government activities "far beyond ordinary regulation or improvement" (*id.* at 178). The Court cited three specific factors that distinguished the case: (1) the pond was "incapable of being used as a continuous highway for the purpose of navigation" (*ibid.*); (2) it had always been considered private property under state law and was "strikingly similar" to fast lands (*id.* at 179); and (3) the private owners, in rendering the pond navigable, could

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(1935)—all show that fiduciary principles are not relevant to the issue before this Court. In Sioux Nation and *Creek Nation,* the Court found that the government's special guardianship powers did not *excuse* it from engaging in otherwise impermissible activities. See U.S. Br. 31 n.25. In *Seminole Nation,* the Court found that the United States' payment of tribal funds to a corrupt tribal government violated a "well established principle of equity that a third party who pays money to a fiduciary * * * with knowledge that the fiduciary intends to misappropriate the money * * * is a participant in the breach of trust and liable therefor to the beneficiary" (316 U.S. at 296). Here, by contrast, the United States' invocation of its navigational servitude is wholly lawful. The government does not violate its trust obligation by refusing to pay an Indian tribe for impairment of noncompensable interests or by exercising valid constitutional powers that advance the public interest. See *Nevada* v. *United States,* 463 U.S. 110, 128 (1983). This same principle dictates rejection of the Tribe's supposedly distinct "fair and honorable dealings" claim, which requires, among other elements, a showing that the United States failed to fulfill a specific obligation to the Tribe (see, *e.g., Aleut Community of St. Paul Island* v. *United States,* 480 F.2d 831, 839 (Ct. Cl. 1973); *Gila River Pima-Maricopa Indian Community* v. *United States,* 9 Cl. Ct. 660, 678 (1986)).

have reasonably expected that they would retain the right to exclude others (*id.* at 179-180). None of those factors is present here.

First, it is beyond dispute that the Arkansas River is a "great navigable stream" (*Kaiser Aetna,* 444 U.S. at 179) that has provided crucial service to interstate commerce since the early nineteenth century. See U.S. Br. 2-6. Second, it is clear that the river, as a naturally navigable waterway, is "incapable of private ownership" (*Kaiser Aetna,* 444 U.S. at 179; see also note 1, *supra*) and that the Tribe's riverbed interests, by definition, cannot be equated with fastlands. And third, given the United States' long history of navigation on and improvements to the Arkansas River, predating the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 *et seq.*, and continuing through the nineteenth and twentieth century (U.S. Br. 2-6, 32-33), the Cherokee Nation cannot credibly claim any reasonable expectation that it could exclude navigation from the Arkansas River.[5]

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[5] The Cherokee Nation argues (Resp. Br. 33) that the Treaty of New Echota gave the Tribe an unqualified "right to exclude" non-Indians from passage on the Arkansas River. However, the Treaty simply states that the Tribe shall be protected from "citizens of the United States, who may attempt to *settle* in the country without [the Tribe's] consent" (art. 6, 7 Stat. 481) (emphasis added). The Tribe also suggests (Resp. Br. 32) that the historical hardships its members have endured should be considered in determining whether the Tribe is entitled to compensation. Although portions of the Cherokee Nation's history are indeed tragic, that circumstance does not provide an open-ended justification for compensation whenever the Tribe sues the United States. The Cherokees have brought numerous actions against the United States for damages arising from their relocation to Oklahoma and have received substantial compensation from the government. See *Cherokee Nation of Oklahoma: Hearings on H.R. 2329 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 27-28 (1981); H.R. Doc. 383, 96th Cong., 2d Sess. 31-32 (1980) (Final Report of the Indian Claims Commission).

Plainly, *Kaiser Aetna's* holding is limited to the factual situation of that case, and does not supplant the long established principle, fully applicable here, that the United States owes no compensation when the construction or operation of a navigational improvement project impairs property interests in the bed of a naturally navigable body of water.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

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